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PROCEEDINGS AND ADDRESSES 1941 CONVENTION

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WILLIS SMITH

President, International Association of Insurance Counsel

1941-1942

President's Page

TO BE elected President of such a group of lawyers as constitute our membership is an event in any lawyer's life that could, with propriety, be coveted by the most distinguished in our profession. Certainly, when I have been accorded this distinction, I indeed feel grateful and responsible to every member of the Association.

Our immediate Past President, Oscar Brown, and those who have preceded him in setting such a high standard of accomplishment, have indeed led the way in developing an association which can well be the pride of every member. The papers read and the proceedings held at the recent Convention were of a high order, and the innovation of round table discussions proved profitable. It is my hope that this high order may be maintained.

The financial condition of the Association is excellent, and the work of Secretary Montgomery and Treasurer Noll has been all that could be desired. The Journal has been most ably edited by George Yancey. To work with three such men for a year is, in itself, a pleasurable opportunity for any lawyer.

The other officers and members of the Executive Committee are intensely interested in the work of the Association. I know that I shall have their unqualified and enthusiastic support. In the appointment of committees, I am having their assistance to the end that the Association may use the services of every member.

Home office counsel have proved their worth in the interest that they have shown and the efforts that they have made in the building of this Association. I am hopeful that to an even greater degree will such counsel participate in the future.

Attendance at the conventions has demonstrated, I believe beyond a doubt, that the members generally are more interested and attend to a greater degree than can be found in the membership of any other association of lawyers. Doubtless our program of high quality, presented in reasonable periods of time and interspersed with opportunities for diversion and recreation, has developed an attractiveness for our conventions that makes each of them a great success. My hope is that we may be able to continue this policy and avoid too ponderous programs that are frequently the bane of some conventions.

The ladies who attend these conventions have added interest and sparkle to the social activities, and their presence is appreciated and much to be desired.

WILLIS SMITH, *President.*

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1941-1942

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America, or any of its possessions, or of the Dominion of Canada, or of the Republic of Cuba, or of the Republic of Mexico, who are actively engaged wholly or in part in practice of that branch of the law pertaining to the business of insurance in any of its branches, and to Insurance Companies; for the purpose of becoming more efficient in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States or Dominion of Canada or in the Republic of Cuba, or in the Republic of Mexico; to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

PROCEEDINGS

Annual Convention International Association of Insurance Counsel

THE GREENBRIER

WHITE SULPHUR SPRINGS, WEST VA.

September, 3, 4, 5, 1941

THE Fourteenth Annual Convention of the International Association of Insurance Counsel was called to order at The Greenbrier, White Sulphur Springs, West Virginia, at 9:55 A. M., Wednesday, September 3, 1941, President Oscar J. Brown presiding.

PRESIDENT BROWN: I am very proud to open what promises to be the largest meeting that this Association has ever had. I am informed by the management of the hotel that the advance reservations are more than we have ever had and I think all of us agree that there are more of our members and their families here at this time than we have been accustomed to seeing at any similar time at our meetings.

We are going to be welcomed officially by one of the officers of the State of West Virginia. I take pleasure in introducing to you Attorney General Clarence W. Meadows of the State of West Virginia. (Applause).

ATTORNEY GENERAL MEADOWS: The State of West Virginia welcomes you! I know that the decision to hold your annual meeting at this beautiful spot nestling among our West Virginia hills, was prompted by a desire on your part, among other things, to dismiss from your minds, for the time being, cares of all nature, and by now I feel sure you are convinced that The Greenbrier and its gracious hospitality is at least one place on earth where troubles may be forgotten—assuming, of course, that insurance counsel have troubles in their well-ordered lives.

Our Governor and the other officers of our State send you their warmest greetings, and we sincerely trust that collectively and individually, you will return again and again to our domain.

Many of you perhaps are familiar only with this locality of our State. However, this is not the only spot therein richly endowed by nature. The mountains, forests and streams of this State challenge and surpass in many respects those of other States, and moving along over our improved highways a constantly changing skyline as seen by the traveler gives diversity to West Virginia's scenery, stimulating to the beholder.

Scenes of another nature, so plentiful in our State, however, will doubtless interest many of those here. West Virginia is one of America's most astounding concentrations of power, wealth and opportunity, and I do not believe a more fertile field for commercial and industrial development can be found. West Virginia possesses in abundance those things so essential in the field of business and industry, namely, markets, labor, power, fuel, transportation, raw materials, climate and numberless lawyers. It is within a five hundred mile radius of half the population of the United States. What an outlet for its products!

In our streams are stored over a million potential horsepower. Located in the heart of the Appalachian Coal Fields, West Virginia ranks first in bituminous coal production. Our oil and gas fields supply over one-tenth of the Nation's natural gas, and from recent developments, the source of this supply has not yet been fully ascertained. Transportation by rail, by highway, by waterway is abundant and cheap. Raw materials abound. Steel mills, clothing mills, glass plants, pottery plants and the great chemical plants in the Kanawha and Ohio valleys bespeak of our raw materials. (Our climate can best be judged by the delightful weather you are today experiencing.)

West Virginia is certainly a hodgepodge or mixture of those outstanding attributes which go to make up an ideal State. It is truly cosmopolitan in this respect—devoid of any one predominant trait or character, usually found present in most States. So, in

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GEORGE W. YANCEY, *Editor and Manager*
MASSEY BUILDING,
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The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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welcoming you to West Virginia, may I propose a toast:

"Here's to West Virginia,
Whose most northern city is farther north than Pittsburgh, Pennsylvania;
Whose most eastern city is farther east than Rochester, New York;
Whose most southern city is farther south than Richmond, Virginia;
And whose most western city is farther west than Akron, Ohio—
So, here's to West Virginia, whether she be northern, eastern, southern or western,
She's a darned good state for the shape she's in."

PRESIDENT BROWN: That is a very, very pleasing welcome and I hope will be with us until the meeting is over.

The formal response will be given by Mr. Payne Karr of Seattle. Mr. Karr. (Applause).

MR. KARR: Mr. Brown, Mr. Meadows, ladies and gentlemen:

Though it would be rather presumptuous for any human being in this day and age to compare himself to one of the 12 Apostles, I appreciate more fully at this moment how St. Paul must have felt when, in opening his first Epistle to the Corinthians, he said, "And I, brethren, when I came to you, came not with excellency of speech or of wisdom. Rather, I was with you in weakness, and in fear, and in much trembling."

A proper response, an adequate response, to Mr. Meadows' very friendly greeting justifies an eloquence far superior to any which I possess. Appreciating my own limitations in that regard, I have been tempted to offer the prayer a colored preacher used in opening a series of revival meetings in a Georgia turpentine camp, and I hope you will excuse my Western blundering on the Southern accent. He prayed as follows:

"O Lord," he said, "give thy servant this morning de eyes ob de eagle and de wisdom ob de owl. Connect his soul wid de Gospel telephone in the central skies. 'Luminate his brow wid de sun of heaben. Turpentine his 'magination, grease his lips wid 'possum oil, 'lectrify his brain wid the lightnin' ob dy word, put 'petual motion in his arms, fill him plumb full wid de dynamite of Thy glory, 'noint him all over wid de kerosene of Dy salvation, and then, Dear Lord, set him on fire." (Laughter).

If all those things could occur to me at this moment, then I might be able to respond to Mr. Meadows' very cordial greeting in the manner which it deserves.

Suffice it to say that when the Directors of the International Association of Insurance Counsel selected the State of West Virginia as a meeting place for our meeting this year in preference to any of the other 47 states in this country, they did so advisedly and with a thoughtful consideration to the advantages of the many glorious resorts in the United States. In West Virginia, located as it is in the Appalachian chain of mountains, they find a variety and a type of mountain scenery that compares favorably with that of any other state in the Union.

MR. SEILER: Just a minute, Mr. Karr. Hold on there. I object to your statement that the mountain scenery of West Virginia just compares favorably with that of any other state in the Union, on the ground that that statement is insufficient, inadequate and incomplete. From my observation of the mountain scenery and the variety and the ladies of West Virginia, they excel that of any other state in the Union. (Laughter and applause).

MR. KARR: Thank you, Mr. Seiler.

Mr. Seiler's objection will be sustained and the correction noted.

Now, as I was saying, in selecting West Virginia as the place for our annual convention, our Directors also have in mind the people of this state. Governor Holt told us last year, Mr. Meadows, that the people of West Virginia combined the industry of the

North and the hospitality of the South. Undoubtedly, West Virginia is selected as our meeting place because there are few places in this country which so truly exemplify this happy combination in its people.

MR. COX: Just a minute, Mr. Karr. I object on the ground that your remarks about the people of West Virginia are insufficient, inadequate and incomplete. Were it not for the fact that the members of this Association failed to find anywhere else in this country more cordial, more genuine people than they have in the State of West Virginia, we would not be meeting here for the sixth time in the last ten years.

MR. KARR: Thank you, Mr. Cox.

Mr. Cox's objection will also be sustained and the correction noted.

Turning our attention now from the scenic beauty of the State of West Virginia as a whole and the fine people in West Virginia, let's say just a word about White Surphur Springs. During the more than 160 years since this resort was started, the exhilerating atmosphere of this climate and the healthful waters of the springs located here have provided health, happiness and contentment to thousands, yes, hundreds of thousands of people, not alone from this country but from all over the world. White Sulphur Springs is truly one of the greatest resorts in the country.

MEMBER: Just a minute, Mr. Karr. Your remarks are incomplete, inadequate and insufficient. Gentlemen, I am going to ask all people who are sitting here in this convention hall this morning, if there is anyone among you who objects to coming to White Sulphur Springs, please stand. Well, I am going to ask one more question. All of you who enjoy coming to White Sulphur Springs and meeting Mr. Meadows and the other charming and delightful folks, please give me a hand. (Applause).

MR. KARR: Well, Mr. Meadows, it occurs to me, as it must to you, that what has occurred in the last few minutes from this entire convention responds to your remarks more eloquently than anything I could say if I were to continue talking indefinitely, and so, simply in conclusion, let me say that I am confident I speak the opinion of everyone who attends this convention that we appreciate most sincerely your very friendly welcome, that we are delighted to be at White Sulphur Springs, in the State of West Virginia, and that we look forward with the keenest anticipation to the finest convention any of us have ever attended. (Applause).

MR. C. M. HORN: Mr. Chairman, I rise to a point of order. To correct Mr. Karr in an unrehearsed spectacle, I wish to call the attention of the association and those present to the fact that there were not 12 Apostles; there were 12 Disciples; and St. Paul was not one of them. (Laughter).

MR. KARR: Mr. President, the objection will be sustained and the correction noted.

PRESIDENT BROWN: The recommendation is that the speaker spend a little more time in his Bible study.

I think we have to thank Mr. Karr and his associates for a very delightful and unusual response. I didn't know anything about it myself; I think it was very nicely done and very cleverly done, and we have enjoyed it.

The next scheduled topic on our program is the address of the President, and you will note that I use the word "Address."

PRESIDENT BROWN: A mandatory provision of our By-Laws is solely responsible for this intrusion on your time. That provision is under the section specifying the duties of the President. It says, "He shall deliver an address at each annual meeting." So burdened now as we sometimes are by the mandatory directions of those who have preceeded us, bear with me while duty is performed.

Your association prospers. I will not anticipate the reports of either the secretary or the treasurer, but in each of them will appear evidence of the continuing stability of our organization.

The entire official family of the association has been most cooperative and helpful. Past President Hayes and your secretary spent an entire day in Chicago early in the fall in assisting the President in completing the year's organization.

The Journal has continued the high standard set for it and reflects the unusual character and great service that for years has been voluntarily rendered this association by its Editor. More than to anyone else in the entire organization, credit is due George Yancey for the present standing and value the association has attained. Our by-laws forbid our recognizing this by any resolution from the floor, but does not close the lips of the President or any member from giving a proper word of appreciation.

I am sure I speak it for you.

During the past year due consideration has been given to the recommendations made by President Hayes for "streamlining" (if I may call it such) the association. The committee having that matter in charge after much consideration and not yet being on agreement as to what, if anything be done, have felt that because of the unsettlement of conditions generally, no attempt at change should be initiated. I feel that decision is a wise one.

Two years ago at the very time of our annual session, an international maniac kindled a fire that has now scorched and seared four-fifths or more of what we are accustomed to call the civilized world. It even now continues its all consuming flame, destroying with equal ferocity, victor and loser, if either there be, and marking the world and its people with scars never to be erased or forgotten.

In its destructive path is falling not only human life in untold and unbelievable numbers, goods and property, treasures irreplaceable, but steadily the vicious fire is burning and destroying governmental ideals, liberty and democracy.

Peoples who for decades, whether their government was called a republic or monarchy, have lived in free lands, no longer have that privilege nor is such a place theirs to find within the reach of their ability to travel.

With many of these the change has not been voluntary but even in those countries where it has not been, one of the wonders of it all has been the number of individuals who have wlecomed and even assisted the new order. Stranger still is the apparent conversion of leaders of thought in whole countries to the idea that liberty and democracy are dead and that successful governments and individual liberty cannot co-exist. The condition of Spain and the official pronouncements from unoccupied France give pause to the thoughtful.

Two years ago it would not have been thought worthy of discussion in such a meeting, that we should pause to consider our place in all this but now, without the slightest temerity, I am going to ask you to consider with me our interest as a lawyer in our system of government. Call it, if you will, the lawyer's stake in democracy.

Under autocracy, whether dictatorships, totalitarian states or by whatever name called, every freedom lover or person in whom the principles of free living exist just because he and his forefathers have lived that way, will suffer.

Except for such general conditions that affect all, most occupation groups will continue their day by day work without change.

Labor is labor under any system of government. The laborer's living from this physical exertion will continue as it always has.

The making of various things whether they be buildings, machinery, instruments, clothing or armaments will require the same processes whether democracy dies or flourishes, and so carpenters, machinists and artisans of various sorts are assured of a continued occupation even though the conditions of their work may not be to their liking.

Such professions are due to survive. Mathematics, Chemistry, Biology and kindred subjects are unchangeable and teachers are required for youth whether they are still members of families or wards of state.

Scientists and researchers will continue to be required.

Disease, too, does not change with changing forms of government. Known always as it has been as no respector of persons, the need for doctors to comfort and ease is always present. The surgeon's skill is as necessary to the subject of an autocracy as to any other persons.

What has been said to be the three cardinal objectives of any occupation, namely, breakfast, dinner and supper, seemed to be as well assured to members of most occupations and professions under totalitarian governments as assurance can be given.

But what of lawyers? What have we to sell under any system of law other than that in which we live? Based on principles of individual rights dating back as far as the Magna Carta our study and training leaves us with knowledge only of those rights and their proper method of enforcement. What place can we have it any system of law where individual rights are not recognized and courts exist, where they exist at all, solely for the purpose of expediting and executing the will of the sovereign?

The question finds its own answer. And the answer leads to the inescapable conclusion that of all groups none have a greater selfish interest in the maintenance of our democratic form of government than lawyers.

It behooves us then to be alert and watchful that it be maintained. That it is threatened from without, none can doubt. But even more dangerous are the happenings from

within, whose full import is not realized until they become accomplished facts.

I believe a recent item in a news magazine that the Mennonites of Pennsylvania were seeking another home becaus their freedom was being infringed by the power which had been acquired by the government to limit the amount of wheat they might raise, was the first real knowledge many had that we had gone so far. For it is true. The government now has power to say how much and how little wheat may be raised by what farmer. And power to enforce its decrees in that respect by depriving the disobedient one of the market for his product.

Only a short time ago the ability of one farmer to raise wheat better or cheaper than another was acclaimed and his industry brought his own reward. Now if a person not now a wheat grower should develop a better wheat or a better method than that now used, his right to use either would depend upon government fiat.

The succeeding steps are brief indeed. From wheat to others, then to all crops—then to compulsory soil tilling by those now doing it and their descendants and none others. And if so with agriculture what short steps to other fields!

Have we gone too far in this direction? I leave with you that question and even more cogent one as to whether lawyers not directly interested or immediately affected should not begin to be heard against such measures.

Many competent observers have given, as the real cause of dictatorships overseas the bankruptcy of the nations affected and the need for drastic control because of the conditions thus created.

What of our own situation in that regard?

Within a month of this date Treasury officials have announced that our national debt exceeded the sum of fifty billion dollars, nearly double its previous peak at World War times. In six weeks following July 1st of this year it had increased a billion and forty million and was steadily increasing at the rate of $277.50 per second.

May I quote here from a radio address of Representative E. E. Cox of Georgia made in June—

"We are told now that we are headed toward a $90,000,000,000 debt. We are also told by another administration authority that we may be certain we shall be compelled to spend at least $40,000,000,000 annually until the war ends. Our Federal debt may go to $90,000,000,000, it may got to $150,000,000,000; no man in or out of government knows what the ultimate debt will be.

"In spite of this alarming prospect, our Government has made no appreciable reduction in expenditures for non-defense activities. What does such a financial course mean? It can mean only that the present solvency of our Government cannot long endure. It can mean only ultimate national bankruptcy, and, as a consequnce, collectivism in its most abhorrent form."

As a measure of defense, the President asked of Congress an appropriation of $125,000,000 for needed defense highways. The Congress promptly replied with an appropriation of nearly three times as much, $325,000,000 with the sum distributed not in accordance with defense needs but in the time honored pork barrel method, based on population, area, etc. The whole thing was so unconscionable, that the President, never known either to his friends or detractors as a penny pincher of the public purse, vetoed the measure.

The Senate promptly voted to override the veto and the house failed to do it by only two votes. And now I understand the members of the Congress are adding the same and many other non-defense millions to an omnibus appropriation bill.

Have your representatives heard from you that the creek in the next township or in your own doesn't need dredging and that if your state hasn't enough money for roads, you and your neighbors can get along without, at least until the vast wastage that necessary defense expenditures entail is ended?

But time will not permit other suggestions of what may and should be done by lawyers to protect and preserve our democratic safeguards and way of living. Nor have I the temerity to suggest them to this group as well or better qualified than I to see where such work may be done.

Without fear of contradiction, however, I say to you that both selfishly and from a standpoint of public sense, that is the work at hand most important to be done.

PRESIDENT BROWN: We next are going to have the privilege of hearing a paper entitled, "Litigation and the Soldiers' and Sailors' Civil Relief Act of 1940," read to us by Mr. John B. Martin of Philadelphia, Pennsylvania. Mr. Martin. (Applause).

(The address of Mr. Martin will be found on page 54.)

CHAIRMAN BECKWITH: I am sure we are all very much indebted to Mr. Martin for his very helpful and interesting paper.

We are next to hear from Mr. John L. Barton of Omaha, Nebraska, on the subject of "Federal Court Rules and Their Applicability to Insurance Litigation." Mr. Barton. (Applause.)

(Mr. Barton's address will be printed in the January Journal.)

PRESIDENT BROWN: I am sure that we are all grateful to Mr. Barton for preparing this paper. He has only summarized the things that are in it, so I am sure those of you who are interested will find both pleasure and instruction in reading the paper as it is published, and it will be published in our Journal.

We next will have the report of the Secretary. The report of the Executive Committee will not be given until tomorrow. Mr. Montgomery, the Secretary.

. . . Secretary Montgomery read his report. (Applause).

You have heard the report of the Secretary.

The next in order is the report of the Treasurer. Mr. Robert Noll of Marietta, Ohio. Mr. Noll.

. . . Treasurer Noll read his prepared report. (Applause).

Both the Treasurer's report and the Secretary's report were subjected to an audit of even date and they have both been accepted and approved by the Executive Committee and, without further action on the part of this body, they will be ordered filed.

We will next hear a report of the General Legislative Committee, by Chairman F. B. Baylor.

MR. BAYLOR: The President appointed a Legislative Committee in each of the states. Then the General Chairman sent out letters to each of the following: to the Association of Casualty and Surety Executives, to the American Mutual Alliance, to the Association of Life Insurance Presidents, to the American Life Convention and to the National Board of Fire Underwriters. We told each of them that committees had been appointed in each of the states and that the services of those committees were available in legislative matters which were of interest to insurance companies.

We then sent about 70 letters to members of this Association who are directly connected with insurance companies, in order that they would have the information, to the effect that if they would get in touch with their Association, the services of his Association would be available in legislative matters.

Most of our requests came from Mr. Kelly of the American Mutual Alliance and from Mr. Drake of the Association of Casualty and Surety Executives. We had 14 requests for services. Those 14 requests were referred to 14 different states and we think the results were good.

To show you how well the members of the State Legislative Committees helped, you will be interested in this one thing that happened. Recently, I was in one of the states and was talking to a proponent of a bill with relation to comparative negligence. He had urged the comparative negligence bill very hard. He told me that a man in that state had gone before the Committee in favor of it. He said, "I can't understand this man, because later he went before the Committee and opposed that bill." I didn't tell him that that was our committeeman and his opposition came as a result of our request.

You can rest assured that the members of these state committees have acted to the benefit of your Association and we feel that very good results have been accomplished. (Applause).

PRESIDENT BROWN: I may say that the members of the Executive Committee and myself feel that Mr. Baylor has done an outstanding job this year in the conduct of this General Legislative Committee.

The next is a report of the Committee on Home Office Counsel, by Mr. Hugh Combs of Baltimore. Mr. Combs.

MR. COMBS: Mr. President, our complete report has been published in the current issue of The Journal. Doubtless, you have had an opportunity to study it. We reported that we had nothing to report. We also reported that we thought our Committee should be continued. (Laughter). There are a dozen of us who like to see our names in print, and particularly in this nice new circular that Dick Montgomery and Mr. Yancey, I suppose, and our President are responsible for. We do wish to report that we are holding ourselves in readiness to attempt to tackle any problems that may be submitted to us. We eliminate from consideration the question of higher fees and how to get business from insurance companies. You have to figure those out for yourselves. But we seriously

will attempt to help on any proposition that the Association may see fit at any time to submit to the Commtitee. Thank you. (Applause).

PRESIDENT BROWN: Thank you very much.

It is the duty of the President at this time to appoint a Nominating Committee and, for your information, there is to be elected at this meeting, as at all meetings a President, three Vice Presidents, a Secretary and a Treasurer and, in addition, three members of the Executive Committee to fill the offices of Robert M. Noll, Wilson C. Jainsen and Willis Smith, whose terms of office expire at the conclusion of this meeting.

The Nominating Committee to be appointed will have its headquarters in Room D in the Virginia wing, I think they call it, just to the left of the entrance to the dining room, and they will have as many open sessions as are necessary to hear the recommendations of the members of the convention as to their own desires as to the proper persons to fill these offices.

The Committee will consist of Past President P. E. Reeder as Chairman, Mr. Alvin Christovich of Louisiana, Mr. Robert W. Shackleford of Florida, Mr. Kenneth B. Cope of Ohio, and Mr. Wilson C. Jainsen of Connecticut.

President Brown called on Mr. Lowell White, General Chairman of the General Entertainment Committee, for a report. Mr. White reported that his Committee had made arrangements for a Tennis Tournament, for a Bridge Tournament, for both the men and the women; for a Skeet Tournament, for a Golf Tournament for the men, and for a Golf Tournament for the ladies, also a Chess Tournament; had arranged for a Cocktail Party on Wendesday evening for members and their guests and that a Banquet was on the program for Thursday evening. The President thanked Mr. White and the members of his Committee for the very excellent job they had done in arranging an entertainment program which would take care of all of the members. (Applause).

MR. TOWNSEND: Mr. President, ladies and gentlemen: Our golf tournament will take place tomorrow following the morning session, on both courses, the Greenbrier and the White, starting, I should assume, about 1:00 o'clock. Preceding that, we will have a hole-in-one contest, starting from the 18th tee of the old White, across the water, and arrangements have been made, as I understand, bv Lowell White to take motion pictures. There will be a very valuable prize for the one who lays nearest to the pin.

Following that, we will have a driving contest and also a putting contest, and there are 20 prizes.

You will be notified of your handicap places and also your starting time. We will expect everybody to be out there to play golf. The Association will pay the green fees but you must pay your own caddy.

PRESIDENT BROWN: What arrangements has the Committee made to get games?

MR. TOWNSEND: If you have no game arranged, I will be outside, or some other member of the Committee, and we will arrange games for you, arrange foursomes for those of you who have not otherwise arranged games.

PRESIDENT BROWN: I am glad we finished our program for the morning as promptly as we have. You have already heard the announcement concerning the afternoon session. Tomorrow morning, please be around so we can start at 9:30, get our work done and have the afternoon for pleasure. The session is adjourned.

Recessed at 12:10 P. M.

*Wednesday Afternoon

The Wednesday afternoon session was called to order at 2:40 o'clock, Mr. Alvin Christovich of New Orleans presiding.

CHAIRMAN CHRISTOVICH: Gentlemen, suppose we come to order and begin our program. For the benefit of those members who were not here this morning, as I explained, heretofore there has been some suggestion from a number of members that it might be wise this year and in the years to come to have round table discussions on various subject matter in the afternoon of either the first or the second day. We are trying it out this time to see just how it works out and how much interest there will be in these meetings, so we will be able to report back to the Executive Committee.

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*This afternoon session was a Round Table on Practice and Procedure, conducted by the Committee on Practice and Procedure, Alvin R. Christovich Chaiman. It proved a most interesting innovation. The leading addresses will be found in sequence immediately following the digest of the proceedings of the convention.

These gentlemen on the program this afternoon have given a great deal of time and effort to preparing these papers and this discussion. I thought maybe we would have a few more in attendance but the time is past 2:30, which was our scheduled starting time, and I think we should better proceed. We expect that this round table will run perhaps an hour or maybe a little more. We have two very interesting Rules to discuss and the first speaker I would like to introduce is Mr. Wilbur E. Benoy of Columbus, Ohio, who is going to discuss with us Rule 49 on Special Verdicts and Interrogatories. Mr. Benoy.

(Mr. Benoy's address appears on page 21.)

CHAIRMAN CHRISTOVICH: Thank you very much, Mr. Benoy, for that very enlightening discussion.

May I say that since we opened this meeting, I find there is quite a good deal more interest than was indicated when we first started. I see that we have quite a nice attendance and we are naturally very happy to see so many members here. It was the thought of the committee that while we wanted to make this a round table and as informal as possible, we thought that, in the interest of brevity, to save some time and possibly to also save some confusion, we might anticipate questions which might be in the members' minds after hearing these papers by referring the papers beforehand to another member of our committee to look over and discuss the subject in the light of the paper that has already been read.

We have termed these members of the committee, discussion leaders, and while I know that upon the conclusion of these papers, if there are any questions that you would like to ask, as long as you confine them to these two particular rules under discussion, I am sure the authors of the papers or the discussion leaders will be glad to do what they can to answer the particular questions, still as I say, in the interest of brevity, we have sort of shifted that over to a discussion leader to, if you will, criticize or discuss the paper of the author. And so I introduce now the discussion leader on the paper that has just been read by Mr. Benoy, Mr. John H. Hughes of Syracuse, N. Y. Mr. Hughes. (Applause).

(Mr. Hughes' address appears on page 28.)

CHAIRMAN CHRISTOVICH: Thank you very much, Mr. Hughes, for your excellent additional discussion of Rule 49.

Now, let us pass on to the next rule, the last rule which is under discussion this afternoon. I am quite sure that many of you here were able to hear the very excellent discussion by Mr. John Barton this morning of a number of rules with which insurance counsel have to deal, and in that paper, Mr. Barton discussed at some length, I believe, the third party practice procedure. Additionally, this afternoon we have for discussion this same rule of third party practice procedure. It is, I believe, gaining more importance as the days go on, and I am sure that we are going to be delighted to hear from Mr. John A. Kluwin of Milwaukee, Wisconsin, who will discuss with you the rule dealing with Third Party Practice Procedure. Mr. Kluwin. (Applause).

(Mr. Kluwin's address appears on page 35.)

CHAIRMAN CHRISTOVICH: Thank you, Mr. Kluwin, for that very fine paper on a very important rule.

I might say, gentlemen, and I think you will agree with me, that there is much valuable material in these papers, material that we might use back home and would like to give some study to, and, for that reason, I understand from the Secretary that these papers will be printed in The Journal, if not in the first one, at least in the second Journal, so that we may be able to perpetuate these papers and keep them for reference.

We now come to the final discussion of this round table, a discussion on this same rule, Third Party Practice Procedure, by Mr George Heneghan of St. Louis, Missouri. Mr. Heneghan. (Applause).

(Mr. Heneghan's address appears on page 40.)

CHAIRMAN CHRISTOVICH: I want to congratulate Mr. Heneghan also on the very fine paper that he has just read.

Now, I think I said we would take an hour or an hour and one-half. We have run a little bit over our time. We promised that we would not tire you gentlemen out if you came to this symposium or round table, and, for the enlightenment of my friend, Mr. Heneghan, I might call his attention to the fact that we changed this from a symposium to a round table so that there might not be any confusion about what was intended to be done here. However, we have run a little bit over our time. We don't want to tire you unnecessarily, except that if there is anyone who has a question to ask, we don't want to

cut off discussion, and if there is anyone in the room who feels that because of some recent litigation in which they have been involved, they have, therefore, because of the interpretation of these two rules in that litigation, some special competence of their own to discuss phases of these two rules which would be of interest generally to the whole assembly here, naturally, we don't want to cut off such discussion. So if there is anyone who has been engaged in any recent litigation or who feels, as I say, any special competence, because of a late interpretation of these rules in their own litigation, we would be glad to hear from them. * * * * * *

MR. G. H. DETWEILER: Mr. Chairman, I want to thank you for having this symposium or round table, whatever we may call it, and I want to move that you ask the Board of Governors of our body to continue this as a regular feature of subsequent meetings of this Association.

MR. C. M. HORN: I second that motion.

CHAIRMAN CHRISTOVICH: Is there any discussion of the motion? If not, all those in favor, please say "Aye." Those opposed. It is carried.

I am glad to hear you say that, sir, because as we started this out, we indicated that we were subjecting ourselves to a guinea pig test here today to see whether or not such a meeting as this would be acceptable to the membership and whether in the future they wanted it continued, and now that you have suggested that it should be, our Committee naturally will take it up with the incoming President and the incoming Executive Committee and indicate to them what your wishes are.

Thank you very much, gentlemen, for coming. The meeting will stand adjourned.

Recessed at 4:55 P. M.

Thursday Morning

The Thursday morning session was called to order at 10:00 o'clock, President Oscar J. Brown presiding.

PRESIDENT BROWN: The first order of business on this morning's program is the Report of the Committee on Life Insurance, by Mr. Paul J. McGough, Chairman. Mr. McGough.

(The Report of the Committee appears on page 51.)

PRESIDENT BROWN: Thank you, Mr. McGough.

We next will have the report of the Committee on Casualty Insurance, Melvin M. Roberts of Cleveland, Ohio, Chairman. Mr. Roberts.

(The report of the Committee on Casualty Insurance will be found on page 45.)

PRESIDENT BROWN: I am sure we will all look forward with interest to reading the work of this committee, and I am informed they actually have worked.

The report of the Committee on Fidelity and Surety Law, Lester P. Dodd of Detroit, Michigan, Chairman. Mr. Dodd.

MR. DODD: Mr. President and members of the Association:

I regret very much to say that the Fidelity and Surety Law Committee has accomplished nothing worthy of comment. The members of the committee have been in contact with each other. There has been nothing of outstanding interest in the wide field of fidelity and surety law that prompted any member of the committee to bring out a comprehensive report. We have stood by; we have tried to keep ourselves in a condition that we could be of any assistance in that field, but beyond that, I am obliged to say that we have accomplished nothing, as I say, that we believe worthy of comment.

PRESIDENT BROWN: We will now be favored by a paper on the question of "Meeting Medical Proof," by Mr. Robert E. Dineen of the firm of Bond, Shinnick and Dineen, of the City of Syracuse. Mr. Dineen discusses a subject that I know personally he is well acquainted with. Mr. Dineen.

(Mr. Dineen's address will be printed in the January Journal.)

PRESIDENT BROWN: Thank you very much, Bob, for that very able and interesting paper.

We will now listen to an address by Mr. Clarence W. Heyl of Peoria, Illinois, on the subject, "The Trend of Decisions in Actions Between Husband and Wife for Personal Injury." Mr. Heyl.

(Mr. Heyl's address will be printed in the January Journal.)

PRESIDENT BROWN: We will now listen to the report of the activities of your Executive Committee during the past year, to be given by Mr. Willis Smith. Mr. Smith.

MR. SMITH: Mr. President and members of the Association:

The report of the Executive Committee is quite short. Your Executive Committee met immediately following the convention and named Mr. George W. Yancey as Editor of The Journal. You heard some reference to the activities of George Yancey as Editor of The Journal on yesterday, so I need not tell you any more about George's activities and his loyal service to this organization, than whom none has given more service, in the opinion of the President, as expressed yesterday, and concurred in by this Executive Committee.

The Committee made all necessary arrangements to carry on the business of the Association through its committees for the coming year, fixed the budgets of the Secretary and Editor, appointed a Finance Committee and ordered that the Secretary, Treasurer and Assistant to the Secretary be bonded.

Your Committee met at Miami on January 27, 28 and 29, 1941, and discussed thoroughly the proposals of Mr. Hayes and authorized the President to appoint a sub-committee to make a further study of Mr. Hayes' proposal and to report back to the Executive Committee at the meeting just prior to this convention. You have either heard or will hear the report of this special committee at this convention and I wish to say that your Executive Committee thoroughly approves of this report.

The Executive Committee requested the Secretary to make a thorough check on the eligibility of the members from the point of view of their Insurance practice, through the chairmen of the State Membership Committees. We are pleased to report that your State Chairmen have unanimously found the membership to be thoroughly qualified in every way.

I might say here that that investigation was made because of the fact that the Executive Committee, in passing upon applications for membership in this Association, has frequently found that there were applications filed or attempted to be filed by men who wished to become members of this Association who were, in reality, not qualified under the By-Laws of this Association, and it was for this reason that the Committee ordered this investigation, in order that we might be able to say to the members at this meeting that those who are in fact members are qualified under the By-Laws and Constitution of this Association.

Your Committee passed on some 100 applications for membership and, as you know, this is one of the most serious duties that the Committee has and requires considerable time and thought. The Executive Committee and the officers of this Association do take very seriously their duties with respect to admitting members to this Association.

The Committee also, as you know from this meeting, decided to meet again in White Sulphur Springs and made the necessary arrangements for the very pleasant time that we hope you are now having.

There were a great many other matters which came to the attention of your Executive Committee during the year, but the results of these discussions and the activities of the Committee are contained in the reports of various officers and various members and committees of this Association. I might say the Executive Committee does have very exacting duties, but it is, indeed, a very pleasant duty to perform because of the association with the members. The Committee endeavors not to be too serious at all times but rather to divide the social activities of the members, both here and at the Executive Committee meetings, so that it might not be tiresome from the standpoint of all work and no play. We have tried to do a little better, however, than was the case of the darkey down in our state who worked at a filling station. He was a veteran of the last war. When news came that he was to receive a considerable bonus, he got ready for an extended vacation. Finally, he received his $857.00 and he announced to his employer that no more was he going to work at this filling station; that he had enough money to last him the rest of his life, and so he left his place of employment and went off to visit the big cities.

In about a month, he was back asking for his old job. His employer, somewhat surprised, said to him, "Why, Rastus, I thought you had enough money to last you the rest of your life."

He said, "Yes, suh, I did too, but it's all gone."

He said, "What did you do with it?"

"Well, boss," he said, "I'll tell you. I went off to these big cities and I spent about half of it on women and I just naturally wasted the rest." (Laughter.)

PRESIDENT BROWN: We will now hear the report of the special committee that was appointed to investigate the desirability of the recommendations made by Past Presi-

dent Hayes at the last annual meeting. Mr. Bill Reeder.

MR. W. O. REEDER: Mr. President and gentlemen:

Our report will be brief. The substance of it was given to you by the President yesterday. This committee, consisting of Pat Eager and Royce Rowe and myself, was appointed to give further consideration to the recommendations of Mr. Hayes and report to the Executive Committee. The Journal carried a request for suggestions from the membership. We really expected to be deluged with suggestions, possibly for or against any change in the general set-up and plan of the Association, but, to our disappointment and surprise, we received two letters, one for and one against the suggested plan.

The Committee did considerable work, however, and all the time became conscious of the changing conditions. Every few days we would see that the government was going to spend more and more money, your money and our money, and the Committee came to the conclusion that conditions today are so different from the conditions of a year ago that possibly it would be better to defer the consideration of this subject on its merits until times became more or less settled.

We were considering that and, fortunately, about the same time we received a communication from Mr. Hayes suggesting that that be done. Gerry Hayes has given this subject possibly more real consideration and thought than anyone else. He originated it; he recommended it. His speech was published in The Journal and later, about July of this year, or June, the latter part of June, he wrote the members of the Committee, stating that, in his opinion, the times were such that further consideration should be deferred. So the Committee was unanimous that that should be done and we so recommended to the Executive Committee, and, especially in view of the fact that this Association is rocking along pretty well at the present time, that is our recommendation. (Applause).

PRESIDENT BROWN: The matter of consideration of this and all the other reports is an order of business for tomorrow morning. That is why I haven't asked for any action on any of them.

We are now going to be favored with an address, "The Casualty Home Office Looks to Local Counsel for Better Public Relations," by Mr. Victor C. Gorton, Vice President and General Counsel of the All-State Insurance Company of Chicago, Illinois. Mr. Gorton.

(Mr. Gorton's address will be found on page 62.)

PRESIDENT BROWN: We will now have the report of the Committee on Compulsory Automobile Insurance, which will be given by Mr. John L. Barton of Omaha, as Chairman.

MR. BARTON: Mr. Brown and members of the Association: This report is very brief and I will read it.

(The Committee Report will be found on page 53.)

PRESIDENT BROWN: Thank you, Mr. Barton.

The meeting is now recessed to convene at 9:30 tomorrow morning.

Recessed at 12:05 P. M.

Friday Morning

The Friday morning session was called to order at 10:10 o'clock, President Oscar Brown presiding.

PRESIDENT BROWN: We will first have the report of the Committee on Workmen's Compensation Insurance, by Mr. Kenneth B. Cope, Chairman of the Committee. This report was published in July issue of The Journal.

(Mr. Cope read his report.)

Thank you very much. (Applause).

PRESIDENT BROWN: We now are to listen to an address on the subject, "May an Insurance Company Rely on the Allegations of a Complaint Against one of its Insureds in Deciding Whether the Case is One Within the Terms of the Policy?" That address will be given us by Lasher B. Gallagher of Los Angeles, California. Mr. Gallagher. (Applause).

(Mr. Gallagher's address will be found on page 58.)

PRESIDENT BROWN: I am sure we are grateful to Mr. Gallagher for his able presentation of a subject that is of interest to all of us.

We now come to the head of Unfinished Business, which first takes up the action of the Convention upon the reports of the Committees, the various Committees that have reported to you during the past two days. What is your pleasure? Do you want to consider them separately or act upon them as a whole?

MR. HORN: Mr. President, I move that they be received and filed as presented.

PRESIDENT BROWN: You have heard the motion. Does it receive a second?

Mr. H. M. ROBERTS: I second the motion.

PRESIDENT BROWN: Are there any remarks? If not, such as favor the motion will indicate by saying "Aye." Those opposed, "No." The motion is carried.

Is there any other Unfinished Business to come before the meeting?

Is there any New Business?

MR. WEISS: Mr. Chairman, may I present a resolution? I wish to introduce this resolution:

RESOLUTION

(Introduced by Sol Weiss, of New Orleans, La.)

WHEREAS, accidents in traffic, in industry, in homes, and elsewhere, are taking an annual toll of approximately 100,000 deaths and 10,000,000 persons injured, and a financial loss of over $3,500,000,000 a year; and

WHEREAS, insurance companies bear a large proportion of this cost, and therefore have a great stake in safety, or accident-prevention; and

WHEREAS, the President of the United States, on August 19, 1941, issued a proclamation calling upon all service and professional organizations, and all citizens, to concentrate upon and to intensify efforts to reduce accidents as an important defense measure, the Chief Executive formally declaring that "accidents are definitely hindering defense effort" and that it is imperative to prevent "the wastage of man-power and material resources;" and

WHEREAS, The International Association of Insurance Counsel should, as a matter of professional service to insurance companies and of proper patriotic duty, take cognizance of the accident situation and adopt some specific measures to combat it;

NOW, THEREFORE, BE IT RESOLVED, That the President of The International Association of Insurance Counsel appoint a special committee on safety, consisting of five members, to study and consider the subject of acccident-prevention, and, with the prior authorization of the Executive Committee, to take such steps as may be appropriate to achieve the desired end, particularly in sponsoring or encouraging, and assisting public education in safety; enforcement of safety laws, ordinances and regulations; legislation; active cooperation with other organizations working toward the same goal (for instance, the National Safety Council, National Conservation Bureau, and Automotive Safety Foundation); and, further, that said special committee shall be privileged to invoke the assistance and cooperation of the members of the Legislative Committee in the several states, in connection with any local situation developing in any specific state;

BE IT FURTHER RESOLVED, that a certified copy of this Resolution be transmitted to the President of the United States and to such national organizations as are participating in the general accident-prevention campaign.

I move the adoption of this resolution. I think it is self-explanatory and that hardly a word is necessary to further emphasize the whereases that are included in the preclude to this resolution.

PRESIDENT BROWN: You have heard the resolution offered by Mr. Weiss. What is your pleasure?

MR. De LACY: I second the motion.

PRESIDENT BROWN: It has been moved and seconded that the resolution offered by Mr. Weiss be adopted. The resolution was adopted.

MR. WEICHELT: Mr. President and members of the Association and guests:

We of Illinois are indeed proud today to bring to this convention a man who is a true representative of Illinois, and when we say that, we mean true representative of the highest ideals of red-blooded Americanism. Senator Brooks we feel is a man fitting to represent the State of Grant, of Logan, of Lincoln. For more than 100 years, his family have been outstanding figures in the progress of Illinois, though perhaps not having attained as great financial success as some have had.

Senator Brooks' father was a minister, and when the World War of 1917 and 1918 was declared, his father, his two brothers and himself joined the Colors—the entire family. His brother sleeps in Flanders Field. The Senator himself, with the Sixth Marines, was seriously wounded, but has recovered.

We have had a nice convention, perhaps the best we have had; but that is nothing new, because every convention seems to exceed the previous one in its success. It seems to surpass the one of the year before. Senator Brooks we feel is a man who stands for the ideals that are true. You may not agree with

some of the things that are said at times, but he is a man who understands war, a man who understands peace, who understands the ideals of America, with an ancestry to be proud of.

The hour is growing late, but I just want to point out one of the things that Senator Brooks has done, as far as this convention is concerned. He was to come down here and enjoy a few days with us, and we are certainly sorry that he and his charming wife couldn't be here, but when the Tax Bill came up in Washington, he felt that that was where he belonged. He went to Washington, and this morning he chartered a special plane. They told us he would be at the airport at 11:00 o'clock. We thought we would get down a little bit early and found him there waiting, and at 2:30 this afternoon, Senator Brooks, representing his state, expects to be on the floor of the Senate voicing the sentiments of the Middle West in regard to the Tax Bill. (Applause).

Ladies and gentlemen, it gives me great pleasure and I feel it a distinct honor, as a member from Illinois, the state that we love, a state that I think America can point to with pride, to present our Senator, C. Wayland Brooks. (Applause as all stand).

(Senator Brooks' address will be printed in the January Journal.)

PRESIDENT BROWN: I am sure that we all appreciate to the utmost not only the very inspiring talk that we have heard but the effort that was made by the Senator to be here and tell us his views. Thank you, Senator. (Applause as all stand).

SECRETARY MONTGOMERY: Will Mr. Hayes please come forward? Mr. Gerry Hayes.

MR. HAYES: Mr. President, ladies and gentlemen, members and guests:

There is a lawyer friend of mine out in our country who has a young son who this year was finishing his examinations in grade school, and at noontime when the young man came home for lunch, his father said to him, "Well, son, how did you get along in your examinations?"

He said, "Well, Dad, I got 95 in arithmetic; I got 94 in spelling; I got 93 in reading, but I can't tell you what I got in grammar, 'cause I ain't took that one yet."

Well, now, Oscar, you ain't got this gavel yet, either, but you're going to get it.

It has become the custom of this organization to present its outgoing President with a gavel with the name of the Association and the name of its owner appropriately inscribed thereon.

A gavel, to a retiring President of this organization, is a symbol of deep-seated friendships with fine men and lovely ladies from all over these United States. The gavel is a reminder of a year of hard work and fine association with the members of the hard-working Executive Committee. The gavel is something to have on one's desk. It is an honor to have it there to remind the owner of all the fine things that have gone before it and which resulted in its award. Oscar Brown has had the honor and the previlege of presiding over the largest convention in the history of this Association and undoubtedly the finest meeting we have ever had. Oscar Brown has worked hard at his job and the results show it. And so, Oscar, I have the honor of presenting this gavel to you, and with it, the well wishes and the love and the affection of all of the members of this Association, and may it always mean to you what it has meant to all of the other members of this organization who have been fortunate enough to have it. (Applause as all stand.)

PRESIDENT BROWN: I want to thank you for this gavel and I want to thank you for letting me work with you. It has been a pleasure every minute. It has been work, yes, but it has been grand work and I have loved to do it.

Now, have we any further New Business? If not, we will listen to the report of the Nominating Committee, Mr. P. E. Reeder, Chairman.

MR. REEDER: Mr. President, ladies and gentlemen of the Convention:

The Nominating Committee which was appointed by your President, consisting of Wilson C. Jainsen of Hartford, Robert W. Shackleford of Tampa, Kenneth P. Cope of Canton, Alvin R. Christovich of New Orleans, and myself, have the following report and recommendations to make as a Nominating Committee:

For President — Willis Smith, Raleigh, N. C.

For Vice Presidents—Allan E. Brosmith, Hartford, Conn. Franklin J. Marryott, Boston, Mass. Hal. C. Thurman, Oklahoma City, Okla.

For Secretary, we have a new man for the job, one Richard B. Montgomery, Jr., of New Orleans, La.

We have another neophyte we have recommended as your next Treasurer, Mr. Robert M. Noll of Maietta, Ohio.

As members of the Executive Committee:

Mr. Patrick F. Burke, Philadelphia, Penna.

Mr. Paul J. McGough, Minneapolis, Minn.

Mr. Francis M. Holt, Jacksonville, Fla.

PRESIDENT BROWN: You have heard the report of the Nominating Committee. It is now the duty of the Chair and the privilege of any member to nominate any member of the Association from the floor for any one of the offices to be filled. Are there such nominations?

MR. H. W. NICHOLS: Mr. President, I move the nominations be closed.

MR. De LACY: I second the motion.

PRESIDENT BROWN: That motion will not be in order until an ample opportunity has been given for nominations from the floor. Does the Chair hear any nominations other than those presented by the Nominating Committee? If not, the motion will be in order. All those in favor will indicate by saying "Aye." Opposed, "No." It is carried.

A motion is now in order that the Secretary, who might feel some embarrassment in the circumstances — I think probably the Chairman of the Nominating Committee would be better—cast one ballot for the nominees as read for the various offices listed. Do I hear such a motion?

MR. HAYES: I so move, Mr. President.

MR. HORN: I second the motion.

PRESIDENT BROWN: The motion has been made and supported. As many as favor the motion will indicate by saying "Aye." Opposed, "No." The motion is unanimously carried.

MR. TOWNSEND: Mr. President, ladies and gentlemen:

You might be interested to know the number of people who played golf. There were 212 who played in the tournament, continuing throughout the rain. Ninety-eight participated in the driving contest; 135 participated in the hole-in-one contest. And in the hole-in-one contest, incidentally, we tried out something novel, as we thought, following the World-Telegram tournament in New York, by having a circle drawn around the hole with a 10-foot radius. There were 135 participated in the contest and of that number, there was only one within the circle, and he was about 5½ feet from the pin. The nearest to him was another gentleman who was 11 feet 3 inches away.

Seventy-five people participated in the putting contest and these are the prize winners. Mrs. Roberts, as Chairman of the Ladies' Golf Committee, is going to now award the ladies' golf prizes first. Mrs. Roberts, will you step forward, please?

Mrs. Roberts has asked me to award the prizes in her behalf. Is Mrs. Lester Dodd here? Mrs. Dodd, you are the winner of the first low gross prize in the ladies' tournament. (Applause).

Mrs. Alexander, will you come forward, please? Mrs. Alexander, you won the second low gross prize. (Applause). We extend you our heartiest congratulations, Mrs. Alexander. It is very good looking.

Mrs. Ray Caverly, please. Mrs. Caverly, you upheld the honor, glory and dignity of our home club. You have won the third low gross prize. Congratulations. (Applause).

PRESIDENT BROWN: I don't know what this (prize) is made of, but today is Mrs. Caverly's silver wedding anniversary. (Applause).

MR. TOWNSEND: Mrs. Fleming, will you come up, please? Mrs. Fleming, you have the honor of having won the first low net prize. Hearty congratulations.

Mrs. Frank Cull, will you please come forward? Mrs. Cull, Mrs. Roberts awards you this very grand prize for second low net for upholding the honor of Ohio.

Will Mrs. L. P. Smith come forward, please. (Not present). Well, Mrs. Roberts is taking that one.

I would like you to meet the best putter in the tournament, Mrs. Frank Kennedy. Mrs. Kennedy, will you please come forward? Mrs. Kennedy, you out-putted all the men, even, so please stand by when we award the prizes for the men's putting contest and you will learn just how well you did.

MRS. KENNEDY: It was purely accidental, I am sure.

MR. TOWNSEND: The winner of the twelve best holes is Mrs. Dunn. Will Mrs. Dunn please come forward. (Not present).

The winner of the prize for the best nine holes is Mrs. McNeal. Is Mrs. McNeal in the room? (Applause). Mrs. McNeal comes from Ohio and is a very grand golfer. (Applause).

There are two surprises. Is Mrs. Maxwell Smith in the room? Is Mrs. Robert Dineen in the room, please? Believe it or not, this is the second prize that has gone to Syracuse. Hearty congratulations, Mrs. Dineen.

I might add that her husband won the driving contest in the rain, with a drive of 265 yards.

PRESIDENT BROWN: Mrs. Roberts, I want to thank you for your work. I think you have done a grand job as Chairman of the Ladies' Golf Committee. (Applause).

MR. TOWNSEND: The winner of the Low Gross in the Men's Tournament was Melvin M. Roberts.

The gentleman who won the low net, which was a 72, was a guest, Mr. Dan McGough, Jr. Unfortunately, we have no guest prizes; we merely accord them honorable mention.

Will Mr. Melvin Roberts step forward, and Mr. Anderson, will you bring up the first prize, please. Mr. Roberts was winner of low gross.

I am pleased to award the next prize to a member of our Committee who has worked very diligently and faithfully, Mr. John Anderson.

Mr. Ray Zelt, winner of first low net. Mr. Zelt is going to spend the rest of his time playing poker.

Mr. Pete Reeder. Pete never reads a newspaper, so we decided that Mr. Reeder should win the radio. Pete Reeder, congratulations.

Mr. Gover won the fourth low net.

Mr. Leslie Beard won the fifth low net.

Mr. Frank Kennedy. Mr. Kennedy, you have won the sixth low net prize. Maybe at times you have roast beef and if you ever get any, here is a carving set.

Mr. Ed. Alexander. Ed. is the winner of seventh low net.

Mr. W. O. Reeder won 9th low net.

Mr. W. C. Searl won the 10th low net.

As has already been mentioned, we had a driving contest yesterday, and Tom Cooper hit the ball 265 yards.

Out of the 100 or more who took part in the hole-in-one contest, Mr. Bob Seiler was the only one in the circle.

One gentleman went around the 18 holes in 16 putts. I would like you to take notice of that. That gentleman is Mr. Hector Kottgen.

Mrs. L. P. Smith, Jr., please.

PRESIDENT BROWN: Mrs. Smith, another Syracuse girl, won third low net in the ladies' tournament. Congratulations. (Applause).

PRESIDENT BROWN: Mark, I want to thank you and the members of your Golf Committee for the very fine job you did. I think it is the first time we have ever had a Golf Committee that worked 24 hours a day.

The Ladies' Bridge Prizes have already been given to the winners. Lowell White has a prize here for the winner of the men's bridge. Mr. White.

MR. WHITE: Mr. President, this prize was won by Mr. L. Cameron.

MR. WHITE: We also have a chess prize for John H. Skeen.

MR. McALISTER: As a result of the Skeet tournament, a very considerable portion of which was shot in the rain, we have some prize winners to announce. I will say now that all of the prizes are identical. They happen to be sports shirts. If you don't like either the size or the color, Mr. Burrell, the haberdasher in the arcade on the lower level says you can come back and trade it in for anything in the place of equal value.

The winners of the tournament are as follows:

In the all-bore class, Mr. Ray G. Zelt, Jr.

Mr. William Porteous was second.

I was fortunate enough to be the winner in the small bore class.

We also shot this tournament in the Lewis Class, and the winner of first place in the second division was Mr. Jim Bussey.

The man who won second in the Lewis Class, we decided to give him a prize, but we won't give it to him for being second in the Lewis Class. We decided to give him a prize for being the best trick shot. He was shooting ducks at No. 7 station. Two birds came out and he shot the first and looked around and said, "What happened?" He had hit both birds with one shot, so we decided to give him a prize for being the best trick shot in the Association. Mr. G. A. Farabaugh, will you come forward, please.

The man who showed the best improvement on his second round over the first round was Mr. Taylor Cox.

PRESIDENT BROWN: Is Price Topping in the room? Mr. Topping was Chairman of the Tennis Tournament Committee but because of the rain yesterday, the tournament is not yet finished. There were 20 participants and I want to thank Mr. Topping for arranging the tournament. The finals will be played at 3:00 o'clock today and the finalists are Hal Thurman and Jack McKay.

PRESIDENT BROWN: I take great pleasure in presenting to you your new President, Mr. Smith. (Applause as all stand). Mr. Smith, the last year has demonstrated

that a poor man as President won't hurt this Association a bit. I want to see what the next year will do with a good one at the helm. May I allow you to use my gavel in undertaking your original duties? Here is your Association, the members of the Association, and here is your President.

PRESIDENT-ELECT SMITH: Mr. President and members of the Association:

It is of course needless for me to tell you that I appreciate this undeserved recognition which you have given me. I know of no organization of men, save only my own state association, which has likewise seen fit to give me undeserved recognition of this sort, that I enjoy my association with or appreciate my contacts with more than the members of this Association.

For more than half of the time that I have been practicing law, I have been a member of this Association, but it was not until I had been a member for several years, until I realized not only the importance but the pleasure attached to attending these conventions. When I get here, I feel very much at home, because I find the men hospitable, pleasant to deal with, and last night as I looked out over the audience at dinner, when I looked at all the beautiful women, I really believed I was back in North Carolina.

I shall enjoy serving as best I can. I realize full well the difficulties that I shall have in attaining the mark set by your President and our President, Oscar Brown, by our Past President, Gerry Hayes, and by those illustrious predecessors that we have had as Presidents of this Association. I can only hope to approach as best I can in my feeble way the achievements of those men, but strive to do that, I shall, to the best of my ability.

I hope that sometime some of you will take advantage of the opportunity of being in the South to stop and visit Mrs. Smith and me in Raleigh. We will do the best we can to entertain you; we will welcome you gladly. We will offer you the best that we have. And when I am speaking of welcoming you to the South, I cannot help but recall an incident that took place a few years ago.

Two young men from the State of New Jersey were traveling through North Carolina in an automobile. They had a collision with a bus owned by a client of mine. The police picked them up on a charge of careless and reckless driving and brought them to the police station, and that morning the judge announced he would try them immediately. My client telephoned me of the accident and, not knowing whether it was serious or not, I went down to sit in to listen to what the evidence was, lest there might be some damage done to our company's property.

I found these two young fellows very charming, they were, indeed, and one of them was on the stand and we had a very lovable and understandable judge, Judge Harris, who is now our leading Superior Court judge in North Carolina. Judge Harris, in listening to their testimony, heard what I heard and, to our surprise, one of these young men said, "Why, it wasn't my fault, this accident. The bus driver admitted that he was to blame." And so, with some consternation, I turned to the driver sitting by my side and said, "Do you mean to tell me you admitted liability to start with?"

"Oh," he said, "Mr. Smith, that isn't the way it happened." He said, "It happened this way. He crashed into the rear of my bus. I stopped the bus and got out and I found a very talkative and attractive young man and he immediately began saying it was my fault that caused the collision, even though he had driven into the rear end of my bus, and," he said, "I said to him, facetiously —and I couldn't help a little sneer, because I detected his brogue—'Of course, it is ALWAYS the bus driver's fault'."

So when it came my chance to cross examine this young man, I said, "Now, my young friend, you said this driver admitted he was to blame. Now, tell us in the exact language just what was said."

Well, he dodged that question for several successive questions and finally I said, I saw no damage had been done to any extent and so I said, "Well, now, my young friend, what did you think he meant when you drove into this man's bus and you heard him immediately say that it was his fault and take the blame?"

He looked at me and smiled very pleasantly; he looked at the judge and smiled very pleasantly; then he turned to me and said, "Mr. Smith, when that bus driver said that to me, I thought it was an illustration of what I had heard of all my life but, never having been in the South before, had not seen; I thought that was a bit of Southern hospitality." (Laughter).

And so when you come to Raleigh, traveling back and forth through the Southland, we shall be delighted to welcome you to Raleigh and to welcome you as best we can and ex-

tend to you a brand of Southern hospitality which we hope you will enjoy.

Again, may I thank you for this distinction, which is certainly undeserved, but I assure you I shall do the best I can, with the help of my predecessor and with the help of the splendid members of the Executive Committee and the Vice Presidents that you have selected to accompany me in this year's endeavors. Again, may I thank you. (Applause).

The new Executive Committee will meet in Room D at 2:00 o'clock.

Is there any further business to come before the Association?

PRESIDENT-ELECT SMITH: If not, I now declare adjourned the Fourteenth Annual Convention of the International Association of Insurance Counsel.

Final adjournment was taken at 12:30 P. M., Friday, September 5, 1941.

PRACTICE AND PROCEDURE ROUND TABLE

Special Verdicts and Interrogatories

By WILBUR E. BENOY*
Columbus, Ohio

PRIOR to the enactment of specific statutory provisions, the Federal courts as well as state courts had the common law power to exercise discretion in asking a jury to find a special verdict or to answer interrogatories accompanying a general verdict. *Walker v. New Mexico & S. P. R. Co.*, 165 U. S. 583, 41 Law. Ed., 837, 17 Sup. Ct., 421; *Spokane & I. G. Rd. Co. v. Campbell*, 241 U. S., 497, 60 Law. Ed., 1125, 36 Sup. Ct., 683; *Simms v. Stark Electric Ry. Co.*, 6 Ohio App., 264, 27 O. C. A., 49; *Pennsylvania Rd. Co. v Stagman* (C. C. A. 6), 22 Fed. (2d), 69. However, prior to the adoption of the rules of Civil Procedure for the District Courts of the United States, the Federal courts were not bound by state statutes authorizing or requiring a trial judge to ask the jury to find a special verdict or to answer interrogatories. *United States Mutual Accident Assn. v. Barry*, 131 U. S., 100, 33 Law. Ed., 60, 9 Sup. Ct., 755; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 Law. Ed., 898.

Rule 49 of the Rules of Civil Procedure entitled "Special Verdicts and Interrogatories" is similar in substance to §§11420-14 to 11420-18, inclusive, of the Ohio General Code. The Ohio provision has been in force since 1894.

The terms "special verdict" and "special findings of fact" are sometimes used loosely and interchangeably even by the courts. See for example *Schaefler vs. Sandusky*, 33 O. S., 246, 31 Am. Repts., 533. The Ohio statute defines a special verdict as follows:

> "A special verdict is one by which the jury finds facts only as established by the evidence; and it must so present such facts, but not the evidence to prove them, that nothing remains for the court but to draw from the facts found, conclusions of law." (§11420-14 General Code.)

The provision for special findings reads:

> "When either party requests it, the court shall instruct the jurors, if they render a general verdict, specially to find upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon. The verdict or finding must be entered on the journal and filed with the clerk." (§11420-17 General Code.)

In the case of the special verdict the jury does not render a general but finds only the facts, leaving the conclusions therefrom to be drawn by the court. The statute specifically provides that special findings of fact on particular questions are to be made only in case the jury renders a general verdict. *Dowd-Feder Co. v. Schreyer*, 124 O. S., 504, 179 N. E., 411.

Rule 49 (a) reads:

*Assisted by his associate, Arthur M. Sebastian.

"The court may require a jury to return *only* a special verdict in the form of a special written finding upon each issue of fact."

49 (b) reads:

"The court may submit to the jury *together with appropriate forms for a general verdict,* written interrogatories upon one or more issues of fact, the decision of which is necessary to a verdict."

The special verdict is a finding by the jury upon all the issues of fact raised by the pleadings. Special findings or interrogatories may be upon a single issue or ultimate fact or upon any number of the issues or ultimate facts of the case. The special verdict furishes the basis for the judgment to be rendered and the general verdict is dispensed with. Special findings provide a means for testing the correctness of the general verdict.

"It is to provide means of ascertaining whether in the general verdict the jury have erred in the application of the law to their conclusions of fact." *Cleveland Electric Rd. Co. v. Hawkins,* 64 O. S., 391, 40 N. E., 558.

I
SPECIAL VERDICTS

The Ohio statute regarding requests for special verdicts reads:

"When requested by either party, the court *shall* direct the jury to give a special verdict in writing, upon any or all the issues which the case presents." §11420-16, General Code.)

Under this provision the court has no discretion but to grant the request of either party to direct the jury to find a special verdict. *Rheinheimer v. Aetna Life Ins. Co.,* 77 O. S., 360, 83 N. E. 481. The wording of the Ohio statute makes its mandatory character clear. The Federal rule does not contain such provision but merely says "The court may require * * * a special verdict * * ." This language would appear to leave the matter wholly within the discretion of the trial court. The only reported Federal case in which the question is touched is the case of *Dallas Ry. & Terminal Co. v. Sullivan,* 108 Fed. (2d), 581, wherein the appellant complained that certain special issues it requested were not submitted to the jury. The court held that the appellant was in no position to complain since it appeared clearly that it knew the case was to be submitted on a general charge and filed and had given certain written requests and instructions in connection with the submission on the general charge. Even if the peculiar circumstances had not existed, there would not appear to have been any error upon the trial court in view of the fact that the rule is not of a mandatory character.

The Federal rules makes some specific suggestion as to how the questions may be submitted to the jury:

"The court may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate."

The Ohio statute has nothing to say in regard to the form in which the questions shall be submitted. The usual method is for the party requesting the special verdict to prepare and submit a form of verdict which he believes to cover the question raised in pleadings and evidence. The opposite party also has the right to submit forms which he believes to be proper. These forms of verdict may be the narrative form which can be used to advantage if there has been a single issue in the case. However, if the issues are more complex, it is more satisfactory that each material issue be covered singly and independently by a question requiring a "Yes" or "No" answer and the answer to each question calling for a finding on a single ultimate fact. *Dowd-Feder Co. v. Schreyer,* supra; *Gendler v. Cleveland Ry. Co.,* 18 Ohio App., 48. Although forms for the verdict may be submitted to the jury, the Ohio statutes do not require that the jury use any of the forms submitted. They may answer a question just as submitted, they may insert additional matter in the forms, or they may draw up entirely new forms. *Rheinheimer v. Aetna Life Ins. Co.,* supra.

The court shall closely supervise the submission of a special verdict and should approve forms before they are given to the jury. *Gendler v. Cleveland Ry.,* supra. The Federal rule clearly gives the court discretion in submitting the questions. In the case of

Maryland Casualty Co. v. Broadway.. 110 Fed. (2d), 357, the court held that Rule 49 (a) did not require the submission of all questions which the parties might request, nor questions which are substantially covered by others, but only such as are raised by the pleadings and evidence. In *Manufacturers Casualty Co. v. Roach,* 25 Fed. Supp., 852, a declaratory judgment action, the court instructed the jury that the policy had been breached. The only questions submitted related to waiver of the breach. The court permitted two questions in answer to which the jury said the company had waived the breach and set the data of such waiver. The court refused to submit a third question: "When do you find that the Insurance Company through its agents knew of the breach?" The court said it had orally instructed the jury on this point when it submitted the question as to whether or not there was a waiver.

The purpose of the special verdict is to secure findings on the ultimate facts of the case, in order that the court may draw the conclusions of law and render judgment. This does not mean merely evidential facts on which the ultimate facts rest. However, inclusion in the answers of evidentiary facts or other matters will not render the special verdicts invalid if beneath all of the finding are found the ultimate facts which warrant a judgment. *Dowd-Feder Co. v. Schreyer,* supra. The findings should not contain conclusions of law, but if they do, the verdict would not thereby be rendered invalid if the ultimate facts are also included. *Noseda v. Delmul,* 123 O. S., 647, 176 N. E., 571, 76 A. L. R., 1133.

Although §11420-14 of the Ohio General Code requires that the special verdict so present the facts "that nothing remains for the court but to draw from the facts found, conclusions of law." §11420-16 says that the special verdict may be "upon *any or all* issues which the case presents." Some of the Courts of Appeal in Ohio have held that the special verdict is invalid where there is not a finding of ultimate facts on all the issues. *Wills v. Anchor Cartage & Storage Co.,* 38 Ohio App., 358, 176 N. E., 680. But the Supreme Court of Ohio has held that a special verdict is not rendered invalid because there is not a finding of ultimate facts on all the issues. In such case, issues which are not determined are to be regarded as not proved by the party who has the burden of proof upon those issues. *Noseda v. Delmul,* supra. However, this rule does not apply where the trial court erroneously refused to submit to the jury questions which were requested. *Pennsylvania Rd. Co. v. Vitti,* 111 O. S., 670, 146, N. E., 94.

The Federal rule makes specific provision for the case where an issue is omitted:

> "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

Since the court is given power to make a finding upon an omitted issue, it necessarily is permitted to consider the evidence in the case in making its finding. *Hinshaw v. New England Life Ins. Co.,* 104 Fed. (2d), 45. This is forbidden in Ohio both by the statute which says the court shall do nothing more than draw the conclusions of law from the facts found, §114420-14, and by the decisions of the Supreme Court.

> "Judgment rendered on a special verdict * * * must be the legal conclusions from the facts found in such special verdict, and the court cannot look beyond such findings of fact." *Pennsylvania Rd. Co. v. Vitti,* supra.

And

> "To warrant a judgment the findings constituting a special verdict must be so clear, consistent and complete that the proper judgment can be rendered from the pleadings and the facts found without reference to the evidence disclosed by record." *Dowd-Feder Co. v. Schreyer,* supra.

As to what instructions are proper when submitting a case to a jury on the special verdict the Federal rule provides:

> "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

The Ohio Supreme Court in discussing this question says:

"Where a special verdict is to be returned by the jury no instructions are proper except such as are necessary to inform the jury as to the issue made by the pleadings, the rules for weighing and considering the evidence, and direction as to the burden of proof, and such further instructions necessary to enable the jury clearly to understand their duties concerning such special verdict. It is not necessary or proper to give general instructions as to the law of the case." *Dowd-Feder Co. v. Schreyer,* supra.

In an action on a life insurance policy the company defended on the ground of fraud and misrepresentation. At the close of the evidence the case was submitted to the jury under rule 49 (a) on thirty-two interrogatories, the answers to which indicated that although the policy holder had falsified he had not made the untrue statements with the intention to deceive or defraud. Such intention was necessary under the law of the jurisdiction. The appellate court therefore reversed the judgment of the trial court for the defendant. *Zolintakis v. Equitable Life Insurance Society,* 108 Fed. (2d), 902.

When a special verdict is rendered under rule 49 (a) and the jury allows certain items of damage, the court may add other items in respect to which the parties stipulated that there was no controversy. *Cleaning Corp. v. Prime Mfg. Co.,* 115 Fed. (2d), 615.

II
INTERROGATORIES OR SPECIAL FINDINGS OF FACT

Subdivision (b) of Rule 9 commences with the same words as subdivision (a), viz., "The court *may* submit to the jury * * * ." The Ohio statute in regard to interrogatories commences with these words, "When either party requests it, the court *shall* instruct the jurors * * * ." When the request is made in the correct form and the interrogatories submitted are proper, the statute is considered to be mandatory and to impose upon the trial court the imperative duty to submit the question or questions for determination by the jury. *Gale v. Priddy,* 66 O. S., 400, 64 N. E. 437; *Cleveland & E. Electric Ry. Co. v. Hawkins,* 64 O. S., 391, 60 N. E., 558. *Mellon v. Weber,* 115, O. S., 91, 152 N. E., 753. But under the Federal rule, just as in the case of special verdicts, there is nothing to indicate that a request from either party is mandatory upon the court.

Although the Ohio statute is mandatory in its requirement, the court may properly refuse to submit special interrogatories to the jury if the request is not properly made, or if the interrogatories are not of proper form and substance. The request must be "to find specially upon particular questions of fact" and the request must be conditioned upon the jury returning a general verdict. That the request be so conditioned is not a matter of form but one of substance, and it is not error for the court to refuse to submit the interrogatories if the condition is not met. Gale v. Priddy, supra. It is not error for the court to refuse to submit the interrogatories where a party requests the court to direct the jury to give a "special verdict" in writing upon certain issues, Gale v. Priddy, supra; or where the party requests the court to "instruct the jury to return a special verdict, answering the questions." *Aetna Life Ins. Co. v. Dorney,* 68 O. S., 151, 67 N. E., 254. The statute itself required that the questions be stated in writing and be answered in writing. §11420-17, Ohio General Code; Aetna Life Ins. Co. v. Dorney, supra; Electric Rd. Co. v. Hawkins, supra. It has even been held that if the forms submitted do not leave sufficient space between the questions to enable the jurors in answering them to sign their names the court need not submit the interrogatories to the jury. *Plaut v. Jacobson,* 19 Ohio N. P. (N. S.) 335, 27 O. D. (N. P.), 379. The request should be conditioned upon the return of a general verdict but it cannot be conditioned upon the return of a general verdict for a particular party, *Pecsok v. Millikin,* 36 Ohio App., 543, 173 N. E., 626; or conditioned upon a general verdict rendered on one of two causes of action. *Hassett v. Watson,* 12 O. A., 451. The court may refuse to submit questions which are uncertain, *Reinhart v. Wellston Iron Furnace Co.,* 5 Ohio L. Abs., 741, misleading, *Ellis v. Twiggs,* 17 Ohio C. C. (N. S.) 172, or indefinite, *Trucking Co. v. Fairchild,* 15 Ohio L. Abs., 157. One should avoid submitting a series of interrogatories without requesting that they be submitted separately. If one or more of the interrogatories is improper, it is not error for the court to refuse to submit the whole series. *MacDonald v. State,* 47 O. A., 223, 191 N. E., 837.

Neither the Ohio statutes nor the Federal rule make any provision for the time when re-

quest for interrogatories must be made. It is not necessary in Ohio that the request be made before argument and it has been held when the request comes after the close of argument and before the court's charge, the court cannot refuse to give the interrogatories to the jury on the sole ground that the request comes too late. *B. & O. Rd. Co. v. McCamey,* 12 Ohio C. C. 543, 5 O. C. D., 631. The interrogatories should be submitted not later than the time at which the case is submitted for decision. *Harker v. Dales,* 13 Ohio L. Abs., 655.

The particular questions of fact which the court is required to submit to the jury when requested, are questions the answers to which will establish ultimate and determinative facts, and not such as are only of probative character, *Schweinfurth v. Ry. Co.,* 60 O. S., 215, 54 N. E., 59. *Gale v. Priddy,* supra; *Davison v. Flowers,* 123 O. S., 89, 174 N. E., 137. However, the facts may be probative facts from which ultimate facts may be inferred as a matter of law. *Gale v. Priddy,* supra; *Mellon v. Weber,* supra. The statute does not require the court to submit to the jury questions whose purpose is only to ascertain the mental processes by which the jury arrives at conclusions of fact. *Cleveland & E. Rd. Co. v. Hawkins, supra.* If questions relate only to evidentiary facts the court need not submit them. *Woodruff v. Paschen,* 105 O. S., 396, 137 N. E., 867.

In the case of *Cleveland & E. Rd. Co. v. Hawkins,* supra, based on the negligence of a street car company's employee, the court refused to submit to the jury any of the numerous interrogatories which were submitted by the defendant, and it was contended that the trial court erred in this respect. The appellate court was of the opinion that the interrogatories submitted were of an evidentiary character and that the trial court committed no error:

> "The statute does not contemplate that by means of such questions the jury may be quizzed respecting the mental processes by which they arrived at conclusions of fact. Its object is to enable the court to determine as a matter of law whether the general verdict is right in view of the jury's conclusions upon questions of fact, not to aid the court in determining whether the verdict is contrary to the weight of the evidence."

However the judgment was reversed because one of the questions was proper and should have been submitted.

In *Woodruff v. Paschen,* supra, an action for malicious prosecution, the defendant requested that special interrogatories be submitted to the jury. The three questions related to whether the defendant had reasonable ground to suspect that plaintiff was guilty as charged, whether before making affidavit starting the prosecution proceedings, the defendant acted upon advice of counsel, and whether defendant acted maliciously in making the affidavit. The issue of the case was not confined to that time but included all of the time from the institution of the proceedings until the conclusion thereof. Therefore, the court held there was no error in refusing to submit the interrogatories inasmuch as an answer by the jury to any one of three would fail to test or control the general verdict.

Interrogatories should not be such as require in answer conclusions of law or conclusions of fact. In a case where the plaintiff has sustained personal injuries when hit by a crane in a steel mill, the defendant requested and had submitted to the jury certain interrogatories, among which was one asking, "Was the plaintiff negligent in any degree directly and proximately contributing to this accident and injuries?" to which the jury answered "Yes." A general verdict for the plaintiff was rendered and the defendant moved the court for a judgment notwithstanding verdict on the basis of the answer to this question. The motion was overruled and the appellate court held that the trial court was guilty of no error.

> "This interrogatory does not call for a special finding upon a *particular question of fact* as contemplated by such statutory provision, but rather for a combined finding of fact and conclusion of law, which conclusion may or may not be drawn from findings of particular fact returned by the jury, and therefore should not have been submitted by the trial court. * * * The answer given, not constituting a special finding upon a particular question of fact, was properly disregarded by the trial court. * * * ." *Steel Co. v. Ianakis,* 93 O. S., 300, 112 N. E., 1013.

In a case where the plaintiff had sustained injuries by reason of an explosion the jury

returned a general verdict for the plaintiff which meant that the jury found negligence upon the part of the defendant in failing to give notice and warning in sufficient time to permit the plaintiff to seek a place of safety. The defendant had requested the court to submit certain interrogatories to the jury but the request was denied. The first of the questions requested was "After the arrival of the firemen on defendant's premises at the time and place in question, were reasonable warnings given by the defendant, its officers or employees, to those around or near the benzol tank building of the danger from the benzol tank?" The Supreme Court held that there was no error in refusing to submit the interrogatory to the jury, because "whether or not such reasonable signal or statutory signal was or was not given is not a 'particular question of fact' but a conclusion to be drawn from evidentiary facts." *Mason Tire & Rubber Co. v. Lansinger,* 108 O. S.,, 377, 140 N. E., 770. Thus the court states, in addition to its holding, that interrogatories are improper which call for only probative or evidentiary facts (*Schweinfurth v. Rd. Co.,* supra), that a conclusion drawn from evidentiary fact is improper. There is a vigorous dissent in the Lansinger case in which the dissenting judge says:

> "More than any other case reported in the books, this judgment demolishes the statute relating to special interrogatories."

Where here is more than one specific act of negligence relief upon any one of which, if proven, could sustain a recovery, the defendant is entitled to a finding as to what particular act or acts of negligence the jury finds the defendant guilty. In *Davison v. Flowers,* 123 O. S., 89, 174 N. E., 137, the court submitted the defendant's first question "Was Albert Davison, the defendant, negligent?" and the jury answered "Yes." The court refused to submit defendant's question "If your answer to defendant's request number 1 is 'Yes,' state of what that negligence consisted." The jury returned a general verdict for the plaintiff. The court held that the question of fact sought to be elicited from the jury by the second interrogatory was an ultimate and determinative fact and not of a probative character. The judgment was reversed and the cause remanded.

The Federal rule contains a sentence concerning the instruction:

> "The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict."

The Ohio statute on special findings has nothing to say on the matter of instruction but it has been held:

> "It is error for the court to explain to the jury the legal effect of the answer * * *, or to give any instruction, explanation or suggestion that seeks to harmonize the answer with the general verdict or with other special findings submitted for determination." *Walsh v. Thomas Sons,* 91 O. S., 210, 110 N. E.

In the case of *Ivey v. Phillips Petroleum Co.,* 36 Fed. Supp. 811, the jury returned a general verdict for the defendant as regards negligence in attempting to kill an abandoned wild well. The jury failed to agree upon the answer to interrogatories regarding the defendant's liability under the statutes relating to waste. The court held that this failure to agree did not prevent entry of judgment on the general verdict because of the court's conclusion that the defendant was not entitled to go to the jury upon the issue of waste anyway. The fact that a jury fails to agree on answers to interrogatories is not necessarily inconsistent with or destructive of a general verdict. There is no categorical rule covering the situation. See 39 Ohio Jurisprudence, 1173, et seq., §440.

The Ohio statute is clear and direct as to the controlling effect of the answers to the special interrogatories.

> "When a special finding of fact is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly." §11420-18, General Code.

In *Central Gas Co. v. Hope Oil Co.,* 113 O. S., 354, 149 N. E., 386, it was held:

> "This language is plain and mandatory. This duty of the court to render judgment on the special findings of fact has been heretofore recognized by this court in Davis v. Turner, 69 O. S., 101, 67 N. E., 815."

In an action arising out of a collision between an automobile and an interurban car in which suit was brought against the car company, the jury returned a general verdict for the plaintiff and in answer to interrogatories found that the plaintiff could have seen the interurban car in time to stop his automobile in a place of safety if he had looked and that he did not look for the car when far enough from the railroad tracks to stop his automobile before crossing. The Supreme Court held that the trial court committed reversible error in not rendering judgment for the defendant on the special findings. *C. D. & M. Electric Co. v. O'Day,* 123, O. S., 638, 176 N. E., 569.

> "To be inconsistent with the general verdict as contemplated by Section 5202 (now §11420-18 General Code) it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and to justify the court in setting aside or disregarding the general verdict on the ground that it is inconsistent with such special finding, the conflict must be clear and irreconcilable." Davis v. Turner, 69 O. S., 101, 68 N. E., 819.

If two issues are pleaded on either of which the plaintiff would be entitled to recover, a special finding on one of these issues against the plaintiff will not control a general verdict in favor of the plaintiff which could be based on either issue, unless the interrogatory has been so framed that the finding will show that the verdict was based solely on that one issue. In a case where the defenses of performance and estoppel were both pleaded, the jury returned a general verdict for the plaintiff, and in answer to an interrogatory said the verdict was based on the issue of performance. Although there was a failure of proof as to the issue of performance, since the finding did not show that the general verdict was based solely on that issue, the general verdict was held not inconsistent with the special findings. *Globe Ind. Co. v. Wassman,* 120 O. S. 72, 165 N. E., 579.

In a case where the special findings related only to certain items of damage claimed and had no reference to certain other items of damage, the answers embodied in such special findings were not conclusive as to the total amount of damages found in the general verdict. Special findings therefore were not inconsistent with the general verdict and the trial court did not err in refusing to set aside the general verdict on the basis of the special findings. *Ohio Fuel Gas Co. v. Ringler,* 126 O. S., 409, 185 N. E., 553.

In determining whether there is a conflict between the answers to the special interrogatories and the general verdict, the evidence cannot be considered. *Comm'rs of Mercer County vs. Deitsch,* 94 O. S., 1, 113 N. E., 745; *Prendergast v. Ginsburg,* 119 O. S., 360, 164 N. E., 345.

Although the Ohio statute presents but one course for the court to follow when the special findings are inconsistent with the general verdict, Federal Rule 49 (b) presents more than one alternative to the court.

> "When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answer, notwithstanding the general verdict or may return the jury for further consideration of its answer and verdict or may order a new trial."

The Ohio statute grants the trial court no such power as the last two possibilities set forth in the Federal rule. And further the Federal rule provides:

> "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for a further consideration of its answers and verdict or may order a new trial."

In the case of *Voelkel v. Bennett,* 2 Fed. Rules Service, 454, a wrongful death action, the jury awarded a general verdict for the plaintiff and in response to interrogatories, answered that the verdict was for the parents and nothing was awarded to the administrator. The court held that the general verdict and the answers were inconsistent and that therefore judgment could not be entered on the general verdict. The court directed entry of judgment for the deceased's parents and against the administrator.

Federal Rule 49 a and b providing for the use of special verdicts and special findings of fact in the Federal courts, although in general intent and purpose are the same as the similar provisions of the Ohio statutes,

present one clear difference. It puts much more discretion and power in the court. The Ohio rules make it mandatory upon the court to use these devices if requested, and in the case of special interrogatories presents no alternative but for the court to render judgment consistent with the findings. The Federal rule permits the court to exercise its discretion in using the special verdict on such interrogatories and gives the court the alternatives suggested above in dealing with such findings. There have been so few reported cases in which the Federal rule has been used that it is difficult to say whether the Federal rule presents any marked advantages over the Ohio rules.

Federal Practice and Procedure
Special Verdicts

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THE special verdict as outlined in the new Federal Rules is not a recent innovation, but on the contrary, is an ancient form of bringing in a verdict streamlined to meet modern needs. The exact date of its inception is not known, though the reason for its conception are. If an early common law jury presumed to bring in a general verdict and it misapplied the law to the facts the jury was attaint. This meant that each member was guilty of perjury and subject to a severe penalty. To relieve itself of this responsibility the jury soon conceived the idea of bringing in a special verdict. Thus the jury would merely state to the judge the facts as found by it, thereby shifting to the latter the responsibility for a correct interpretation or application of the law. Since at that period the judges also were subject to the same penalty for a misinterpretation of the law, a fight between the two was the natural outcome. Each tried to place upon the shoulders of the other the burden of correctly applying the law. It thus remained for Parliament to clarify the situation in Chapter 30 Statutes of Westminster II 1285. This statute, which is merely declaratory of the common law, set forth the right of the jury to bring in a special verdict if it so desired.

It is certain then that at common law the judge could not compel a general verdict, but it is indecisive whether he could compel a special verdict. However, in the United States it has been assumed that the judge could compel a special verdict.

The original reason behind the special verdict has with the passage of time disappeared, but a moment's reflection should convince even the most doubtful that it has a definitely utilitarian function today. Many of its supporters strongly urge abolishing the general verdict and supplanting it with the special verdict, and if the truth is to be uttered there is a great deal of merit to this contention.

As Professor Sunderland of the Michigan Law School has pointed out, there are three possibilities of error by the jury when they are performing in the normal manner, i.e., the general verdict. They may be mistaken in (a) the law; (b) the facts; or (c) the application of the law to the facts.

The average juror today is a layman with little or no knowledge of law. At the termination of a case he must sit in the jury box and listen to a judge drone on seemingly endlessly, charging them with the law to be applied to the particular case. And in many instances it can probably be truthfully said that the judge has spent many painful hours in preparing his charge in order that he may clarify to the jury some nebulous distinction in the law with which even the most learned lawyer would have difficulty. To expect then that twelve laymen can proceed to a jury room and correctly apply the law to the facts as found by them is closing one's eyes to reality and living in a world of illusion.

The general verdict often acts as a veil of secrecy completely hiding from view the mental processes indulged in by the jury in determining the facts in each particular case. Its conclusion as to liability or non-liability may often be actuated by passion or prejudice. Yet to those constrained to stand around in the corridors of the court house impatiently waiting for the jury to bring in its verdict this fact will always be concealed, for the verdict will be a terse statement "We find for the plaintiff in such and such amount"

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or "We find that the plaintiff has no cause of action." The jury is not compelled to account as to how it arrived at its conclusion.

But even assuming that each juror has correctly understood the law as charged and has ascertained the facts honestly and without passion or prejudice, there is still another obstacle to surmount. This takes form in the application of the law to the facts. It takes no great stretch of the imagination to visualize the difficulty with which those unlearned in the law are faced. In a complicated case it might be safe to say that the odds are more than fifty to fifty that the jury would fall into error.

The utility of the special verdict then becomes more apparent. Since the sole function of the jury is to ascertain the facts, leaving the application of the law to the judge the need of a lengthy complicated charge on the law with all its concomitant on the jury is dispensed with. Thus one source of error is eliminated. In the special verdict the form the verdict takes is usually answers to various questions covering the ultimate fact issues in the case. For this reason the jury is compelled to deliberate on each material fact issue in the case. Further since each answer is exposed to public view and can be tested by the evidence as adduced from each of the witnesses the jury is constrained to answer each question honestly thereby to some extent eliminating the play of passion and prejudice. This will have an ameliorating effect on the fact-finding function of each juror. As has been pointed out, the complicated and lengthy charge on the law is to a large extent dispensed with with the natural result that the difficult task of applying the law to the facts is pro tanto eliminated.

But the benefits flowing from the adoption of the special verdict are not necessarily limited to a more accurate and more just verdict. Such a verdict also furnishes an appellate court with a more accurate and more complete picture of the case as it was finally disposed of at the trial. This necessarily means a great saving in time and expense which is no mean accomplishment in these days when the bar is subject to such severe criticism by the public for just these very reasons.

An appellate court when reading the record of a case on appeal in which the special verdict has been employed, is directly appraised of just what facts were found by the jury. There is no resort to guess-work based on the ultimate disposition of the case by the jury which practice is so prevalent today. The court knows just what the finding was on each material fact issue in the case and if the jury could not reasonably so find from the evidence adduced at the trial, then the source of error is localized, or, if on the other hand the particular fact which was erroneously found was immaterial and would not alter the judgment in the case, then the necessity of a new trial is dispensed with. Or if the error committed at the trial was a misapplication of the law, the appellate court has before it the facts as found by the jury and so can direct the entry of the proper judgment thereby obviating the waste of time and money which go hand in hand with a new trial. In short, the appellate court has before it a concrete case to which it can properly apply the law instead of a hypothetical charge on the law which must be correct in every particular or it will be presumed that the bad portion influenced the jury in its general verdict.

The advantages and the value of the special verdict then are self-evident. Its widespread adoption would mark the highwater mark of our jury system. The jury system is fundamentally sound, which is evidenced by the fact that despite the passage of several centuries it still stands. This does not mean, however, that the system is perfect or that it has achieved its millenium. There is still a great deal of room for improvement and the adoption of the special verdict would mark a more scientific use of a fundamentally sound system.

At this juncture a natural question is why, if this idea of a special verdict is so old and has so many advantages, has it not had a more widespread use. The answer to this question is that the special verdict, as it exists in most states today, has been placed in a strait-jacket. Form is exalted over substance. The special verdict as brought in by the jury must be complete in every respect and sufficient to support the judgment entered thereon. It must contain findings on every material fact disputed or undisputed (Hodges v. Easton, 1883, 106 U. S. 406), and this does not mean evidentiary facts from which the material facts can be inferred nor conclusions of law.

This common law special verdict unmodified is too dangerous a practice for the average lawyer. The questions forming the basis for the special verdict are too often hastily

drawn up by counsel at the trial. It thus happens that on too numerous occasions the verdict contains one or more of the following defects. Immaterial matters are included or material matters may be omitted. Conclusions of law instead of facts may be found or evidentiary facts may be found. Questions may be put to a jury in such form as to be uncertain, misleading, or prejudicial.

Because there are so many pitfalls for the unwary the special verdicts has been condemned. On the other hand the general verdict, whereby all these errors are shrouded by a veil of secrecy which cannot be pierced, is exalted. The general verdict though it often results in injustice and an excessive number of new trials, is preferred just because these errors are concealed from the public view. To draw an analogy the bar is like an ostrich burying its head in the sand at the first sign of trouble.

Realizing the advantage to be derived from the widespread adoption of the special verdict several states, notably North Carolina, Wisconsin and Texas have taken the initiative in streamlining this practice. They have tried to eliminate the many pitfalls which formerly hampered and brought into disrepute a practice which was inherently sound. As modified this practice has resulted in benefit to the bench and the bar to say nothing of the litigants themselves. Following the lead of these states, Federal Rule 49 of the new Federal Rules, has been enacted and as promulgated it is a noteworthy step in this direction.

Since this new Federal Rule is in its infancy it would be well to analyze it and understand its background in order that one may forecast what interpretation the federal courts will place upon it in the future. However, the rules are so new and so few cases have arisen under Rule 49 that any attempt at this juncture to prognosticate is really pure speculation.

Rule 49(a) begins "The court *may* require a jury to return only a special verdict * * *." The wording of the statute then is permissive and not mandatory. It would therefore seem that the question is one lying entirely within the discretion of the trial judge and that it cannot be demanded by counsel as a matter of right. In the preliminary draft of this rule the court "could require a special verdict only if both parties consented, or of its own initiative in cases not triable as of right under the Constitution of a statute of the United States." (See E. H. Hammond "Some Changes in the Preliminary Draft of the Proposed Federal Rules" (1937) 23 A. B. A. J. 629,633. This placing of discretion in the hands of the judges is a departure from the common law special verdict where the matter rested solely with the jury. However, one can only hope that the federal judges will be lenient with counsel when they demand a special verdict and that they will not abuse the discretion placed in their hands.

The rule then proceeds "in the form of a special written finding upon each issue of fact." The statute is clear that the special verdict must consist of written findings by the jury. Further comment on this phase then is unnecessary. The problem of "each issue of fact", however, is not so simple. But it does seem clear that what is desired under the rule is a finding on the ultimate facts. This does not mean evidentiary facts from which the ultimate facts can be inferred, nor does it mean conclusions of law. Though the distinction from the former is somewhat clear-cut the latter presents more difficulty. In other words one runs into the age-old distinction between law and fact. Are questions of negligence, notice, capacity to make a will, marriage, etc. ones of law or ones of fact. This distinction one must be frank to admit is going to be a source of some trouble to those making use of Rule 49 (a). The only logical solution would seem to be to ascertain in advance how complicated or how involved the particular legal standard to be applied is. If it is not too involved and can be clarified and explained in a very simple charge then the judge should deliver such a charge to the jury and allow it to make a finding on the issue. On the other hand, if the legal standard to be applied is one which would tend to confound rather than to enlighten the jury it should be treated as a question of law and left to the trial judge to determine. The discretion in this matter should rest in the hands of the court.

In Manufacturers Casualty Co. v. Roach (1939) 25 Fed. Supp. 852, the first case decided under Rule 49, it would appear that the trial judge submitted rather a broad question to the jury. The action was one for a declaratory judgment by the insurer declaring its non-liability on a policy of insurance. One of the two questions submitted to the jury was "whether the insurance company waived the breach" of the policy. It might have been better in such a situation to have de-

termined this question by a series of short questions. In the form as asked the jury was more or less apprised of the result of its findings and it was also compelled to determine a broad legal concept.

The necessity of the trial judge submitting every question demanded by counsel was raised in Maryland Casualty Co. v. Broadway (1940) 110 Fed. (2nd) 357. This was an action by the widow and children of a deceased workman for compensation under the Texas Workmen's Compensation Law. It was alleged that he had died from pneumonia caused by exposure while at work to fumes of sulphur dioxide. Since the disease must have arisen naturally from a bodily injury to give rise to compensation the following two questions requested by counsel for the defendant to be submitted to the jury were important. "Did the injury, if any, to some extent reduce the power of resistance and in that manner contribute in some degree to his death?" "Was Broadway's death due directly to an independent intervening agency such as pneumonia?" The trial judge refused to submit these questions to the jury. The judge awarded compensation to the plaintiffs based on the jury's special verdict. On appeal the Circuit Court of Appeals while conceding that these were important questions, sustained the trial judge holding that these questions were covered adequately by two other questions on the same issue. It stated "Rule 49 (a) does not require the submission of all questions which the parties may request, nor of requested questions which are substantially covered by others, but only such as are raised by the pleadings and evidence and are important to the judgment to be rendered." Such a statement impliedly gives a great deal of discretion to the trial judge and is a noteworthy step in the proper direction.

Rule 49 (a) then proceeds "In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate." Under this section of the statute the court is given a wide latitude in the submission of questions. It seems safe to say that under the new Rule the court can assume the existence of facts of which it would take judicial notice. Also the court should determine if there is sufficient evidence to submit to the jury on an issue, and if there is not it should refrain from so doing and treat that fact as found for the proper party, or it should direct the jury to bring in a finding on that issue for the proper party.

It has been determined that it is unnecessary to submit an undisputed or stipulated fact to the jury. Hudson Rug Refinishing & Cleaning Corp. v. Prime Manufacturing Co. (1940) 115 Fed. (2nd) 615. This was an action for breach of warranty in the sale of rug drying equipment and also involved the question of misrepresentation. The jury brought in a special verdict assessing damages. The court awarded judgment on this and also found that plaintiff was damaged in an additional sum for expenses incurred in preparing its premises for the installation of the equipment. The defendant had stipulated with the plaintiff that the damage arising from this installation was not in controversy and there was no controversion of this fact in the evidence. However, the defendant as one of its assignments of error contended that the court was without power to increase the damages as found by the jury on the ground that this amounted to a deprivation of its right to trial by jury. The Circuit Court of Appeals in sustaining the trial judge held, that since the trial judge might have directed the jury, in view of its special findings, to return a verdict for these additional damages and since the evidence was undisputed, there was no error.

As to the form the questions to the jury should take it would be well to throw out several warnings. The questions must be a fair presentation of the facts to the jury. They should not be leading. It is not amiss at this point to reiterate what was said when discussing Manufacturers Casualty Insurance Co. v. Roach (supra) that it is much more preferable in phrasing the questions to have them so stated that the legal consequences of its findings are concealed from the jury. In the framing of the questions one should also guard against having several findings contained in one question. There should be a separate question for each particular ultimate fact sought to be found in counsels favor. It is also well to be on the lookout for questions which in their phraseology assume a fact on which a finding has not been made. To guard against any such inference words negating such an assumption should be included.

Since the statute permits the court to sub-

mit written forms of the several special findings, A. E. Lipscomb in an article entitled "Special Verdicts Under The Federal Rules" (1940) 25 Washington Univ. Law Quarterly, 185, points out an interesting question which has arisen in Texas practice. Normally each litigant is entitled to an affirmative presentation of his theory of the case to the jury. However, under a plea of general denial which is tantamount to a negating of all the plaintiff's allegations, an affirmative defense cannot be shown. The Texas courts have held, however, that the defendant, upon request, is entitled under the rebuttal theory of the general denial to affirmative interrogatories presenting his view of defense.

As regards the form of the special verdict, Professor Sunderland of the Michigan Law school has made an interesting suggestion. He points out that the pleadings in an action should contain the ultimate facts. Therefore he suggests that more care should be exercised in their drafting so that they may ultimately be submitted as the proposed findings to the jury. It is his theory that if they contain conclusions of law or evidentiary facts or are indefinite and uncertain, this defect can be taken advantage of by a proper motion. If counsel neglects to rectify these defects by proper motion, this is treated as a waiver of any right to object on these grounds to the submission of the pleadings to the jury as proposed findings.

The Rule next provides "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." This subject has been touched on earlier and so will not bear repetition. Suffice it to say that the charge should be eliminated as much as possible and should be limited to the few instances where a simple legal standard can be set forth to the jury to apply in the less complicated situations where there is a mixed question of law and fact. It would be well if the appellate courts will give the trial judge a great deal of discretion in this matter. Naturally there will be instances where there is an abuse of this discretion but any objection to it should be treated as waived unless a timely objection is made.

In some instances, however, the charge to the jury can be dispensed with by incorporating the legal standard within the question i. e. "Do you find that on such and such an occasion (describing it) X exercised the degree of care and caution, if any, that an ordinarily prudent man would have exercised under the same or similar circumstances?"

As to the question of burden of proof, it has been suggested that the proper practice is to point out where and not upon whom the burden of establishing the preponderance of the evidence lies. This can be done also by the form of the question i. e. "Do you find from a preponderance of the evidence that (describing the fact sought to be determined)?"

Rule 49 (a) concludes "If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." This is probably the most important section of Rule 49 (a). The common law special verdict had to contain every material fact necessary to support the judgment or it was a nullity. This was also the old federal rule and in Hodges v. Easton (supra) the Supreme Court went so far as to hold that even when the facts omitted from the special verdict were conceded or not disputed at the trial the court could not consistently with the constitutional right of trial by jury presume that a jury trial on the omitted findings had been waived. On the contrary it asserted that every reasonable presumpion against its waiver should be indulged.

In the light of this decision it would seem that there is serious doubt as to the constitutionality of this section. However, since the Supreme Court itself promulgated the new Federal Rules the prevailing opinion is that one is safe in assuming its constitutionality. One case has been decided under this section, Hienshaw v. New England Mutual Life Insurance Company (1939) 104 Fed. (2nd) 45, but the court merely cites the section and no question of its constitutionality was raised. It was an action for a declaratory judgment by two insurance companies. The defendants filed a cross petition seeking relief as by an action for rescission demanding the return of premiums on an insurance policy. An issue raised in the case was whether the deceased policy holder had been misled by misrepresentations by an insurance agent. However, there were no findings whether the

policy holder relied upon or was induced or influenced thereby to enter into the contract. No rejuest to so find was made. When the jury returned its verdict judgment was entered for the plaintiffs on all the findings. The Circuit Court of Appeals sustained the judgment, citing the above section of Rule 49 (a).

Though the rule makes no provision for the situation where the jury brings in a special verdict containing inconsistent findings, it would seem that the trial judge has two alternatives. He can send the jury back for further deliberation or he can declare a mistrial. If such a contingency occurs the jury obviously has failed to properly perform its function. However, before choosing either of the two alternatives outlined the judge should try to give force and effect to all the findings as originally brought in by the jury if he can logically and reasonably do so. However, if the findings on the material issues are so inconsistent that this cannot reasonably be done he has no alternative but to take one or the other of the above steps.

Rule 49 (b) deals with a general verdict accompanied by answers to interrogatories. It should be remembered that there is a great distinction between the special verdict and the general verdict accompanied by answers to interrogatories. When bringing in the former the jury merely determines the fact issues and a general verdict forms no part of it, whereas in the latter the jury brings in a general verdict accompanied by answers to interrogatories which tend to explain it.

This practice of submitting written interrogatories to accompany the general verdict had its genesis in the common law practice of interrogating the jury when it returned an unanticipated verdict. Professor Morgan of the Harvard Law School has pointed out that at common law it is not clear whether the judge could coerce an answer. Though the later English cases seem to accept without argument the view that the judge may examine the jury to ascertain the basis of its general verdict, they do hold that he may not, without the consent of the parties and the jury, charge the jury to return answers to special questions with the general verdict. Professor Morgan also points out that in the United States the practice of submitting interrogatories, the answers to which are to accompany the general verdict, is generally recognized as proper at common law.

The general purpose of this practice is to catechise the jury as to the grounds for its verdict. It has also played a large part in complicated cases involving several parties where it has been employed to determine the relationship and liabilities of the respective parties. It has served a useful purpose in many instances because it has compelled the jury to think on certain material fact issues in order that it might properly answer the interrogatories, whereas without them it might have hastily formed its general verdict completely swayed by emotion.

The main criticism of this practice, however, is that it is purely negative. The jury also brings in a general verdict and the answers to the interrogatories are more or less a test of its soundness. If the answers are inconsistent with the general verdict, the trial judge has no alternative but to send the jury back for further deliberation or declare a mistrial. If on further deliberation the jury fails to amend its answer, then a new trial must result.

Rule 49 (b) has sought to rectify this latter defect and it does so in part as will later appear. Though the general verdict accompanied by answers to interrogatories is an improvement over the general practice of merely having the jury bring in a general verdict, the writer does not feel that it can measure up to the standards of the special verdict. However, provision is made for it in the new Federal Rules and it can serve as a stepping stone for those who do not wish to make such a sharp break with the more common practice.

The new rule commences, "The court *may* submit to the jury * * * ." Again it can be seen that this section is permissive merely and not mandatory. This practice lies entirely within the discretion of the trial judge and cannot be demanded by counsel as a matter of right.

It then continues "* * together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." It is obvious from the rule that the court once it assumes to act is not compelled to submit interrogatories on every material issue. The rule states "one or more." This is giving a wide discretion to the judge and is as it should be. Again one finds the words "issues of fact" in the statute. This matter has been covered in the discussion of Rule 49 (a) and suffice it to say that again the statute means ultimate facts. How-

ever since the function of the jury under Rule 49 (b) is to apply the law to the facts, in other words bring in a general verdict, there will by no means be the same strictness as will arise under Rule 49 (a). The statute also provides that the interrogatories must cover only material issues of fact. Naturally enough, cases will arise in which there will be a dispute as to the materiality of an issue. However as has oft been reiterated a great deal of discretion should be vested in the trial judge. But even if an immaterial issue be submitted, in the vast majority of cases no harm will be done.

Provision is made for instruction to the jury in that part of the statute which reads "The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict." As has been pointed out, under Rule 49 (b) the jury brings in a general verdict as well as answers to interrogatories. Thus the need for the charge to the jury is obvious. The same problems will arise under this section as arise when use is made of the normal method which is to have the jury return a general verdict.

The rule continues "When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers." This section is self-explanatory and so merits little or no discussion.

However, the following provision is the most important part of Rule 49 (b). It reads "When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict or may order a new trial." It can thus be seen that the trial judge in the situation outlined has the choice of three alternatives. However, the first is by far the most important. Its effect is similar to that of a special verdict for the judge can disregard the general verdict and enter judgment in accord with the answers to the interrogatories. But it must be remembered that the exercise of this right is entirely discretionary with the trial judge and may only be exercised when the answers are consistent with each other. One of the two cases arising under this section are Voelkel v. Bennett (1940) 31 Fed. Supp. 506. This was a negligence action for killing an infant brought by his administrator and by his parents in their own right. The jury brought in a general verdict for the plaintiffs. To interrogatories submitted by the court the jury answered that the recovery was awarded to the parents and nothing was awarded to the administrator. The court directed entry of judgment for the whole sum in favor of the parents. Plaintiffs objected on the ground that the jury found generally for the plaintiffs but awarded no damages to the administrator, but their motion for a new trial was denied. The court cited the above provision of Rule 49 (b).

The other case involving this provision is Ivey v. Phillips Petroleum Co. (1941) 36 Fed. Supp. 811. This was an action for damages to plaintiff's property as a result of defendants attempts to blow out a wild oil well. Plaintiff's action was based on negligence and violation of a waste statute. The jury brought in a general verdict for the defendants and answered interrogatories which showed no negligence on the part of the defendant though there was a disagreement on the question of violation of the waste statute. The court had charged the jury on the waste theory though doubting its validity. The court after the return of the verdict directed entry of judgment for the defendant. The plaintiff objected to this in light of the answers to the questions on the issues of waste. The court held however that on mature consideration the waste theory was without merit. Therefore though the jury disagreed on the answers to this theory it did not prevent the court from entering judgment on the general verdict.

The rule finally concludes "When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of the judgment but may return the jury for further consideration of its answers and verdict or may order a new trial." Thus when the answers are not only inconsistent with the verdict but also with each other the trial judge's choice of alternatives is narrowed to two. He cannot enter judgment but must return the jury for further consideration or order a new trial. This is sensible for in such a situation the jury has utterly failed in its purpose.

In conclusion then it must be said that the Rule 49 is a noteworthy contribution to trial

practice. It has released the special verdict from the strict requirements which so hampered it at common law. It has also relaxed the rules surrounding the general verdict accompanied by answers to special interrogatories. These two rules now stand ready and waiting for use and if given the proper cooperation by both the bench and bar should undoubtedly elevate to a new high our jury system today.

The rule is now in its infancy. Very few cases have been decided under it. Thus a great deal of its success rests in the hands of the trial judges and counsel throughout the country. Necessarily the trial judges are vested with a wide discretion. If exercised properly success is assured. On the other hand, if it is abused the rule can be quickly brought into disrepute. Likewise counsel can make a great contribution by cooperating with the trial judges. They should refrain from asking innumerable questions aimed at confounding the jury. If the proper measure of cooperation is given, they will discover that they have in their hands a new tool which will redound to the benefit of all.

Third-Party Practice Under Federal Rule

By John A. Kluwin
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IN the early practice of the law plaintiff's counsel selected the party or parties whom he decided to prosecute and the action then proceeded to judgment without the injection of additional parties to the law suit. Originally at common law the remedy of interpleader was confined to a few limited types of actions such as detinue and writs of quare impedit and the right of ward. However, by a statute of William IV, the right of interpleader was extended to actions of assumpsit, debt, detinue and trover. In later years third-party practice became well known in the admiralty law, but it is of comparatively modern origin in law and equity generally. It is developmental law in keeping with modern social justice. In the State Courts of Iowa, Louisiana, Maine,Pennsylvania, New York and Wisconsin Third-Party practice has been permitted under specific statutory provisions for a considerable period. In Texas the practice came about by judicial decision.

The first Federal interpleader act was adopted in 1917 and was subsequently amended in 1925, 1926 and 1936. Prior to September 16, 1938, when the new Federal Rules became effective, our Federal Courts indulged in some third-party practice arising under various state statutes, which statutes had been invoked under the Conformity Statute, 28 U.S.C.A., Sec. 724, which statute now has been superseded by the new rule.

While this paper is primarily interested in a discussion of Rule 14, we must not lose sight of Rule 82 as it may affect the application of Rule 14. Rule 82 provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein."

Rule 14 provides that a defendant may, before service of his answer, move ex-parte for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the answer has been served, notice must be served upon the plaintiff of defendant's request for leave to serve as stated. The rule provides that *if* the motion is granted and the summons and complaint are served, the person so served, hereafter called the third-party defendent, shall make his defenses as provided in Rule 12 and may counterclaim and crossclaim against the plaintiff, the third-party plaintiff, or any other party as providded in Rule 13.

You will note that the foregoing statement contains the word "if". It is apparent, therefore, that the granting of such a motion would appear to rest entirely in the sound discretion of the trial Judge. In this connection your attention is directed to the case of General Taxi Cab Ass'n. vs. O'Shea, 109 F. 2d. 671. The plaintiff, guest occupant of a motor vehicle, brought an action against the taxi cab company for personal injuries which company in turn filed a motion and a proposed third-party complaint in which it charged that plaintiff's injuries were caused solely by the negligence of the proposed third-

party defendant. At the hearing on the motion plaintiff's counsel stated that he did not desire to amend his complaint to allege any cause of action against the proposed third-party defendant so that court in the exercise of its discretion overruled the motion upon the theory that neither the defendant nor the plaintiff was alleging any cause of action against the third-party defendent. The decision of the District Judge was affirmed by the Appellate Court and in disposing of the matter stated:

> "We think there can be no doubt that it was thus intended to make the impleading of third-parties in the Federal practice discretionary with the trial court. * * * We could find error in the instant case only upon the theory that the overruling of the motion to implead third-parties was an abuse of discretion. We find nothing in the present record indicative of an abuse—especially since neither the appellee, nor even the appellants themselves, asserted a cause of action against the proposed third-party defendants."

The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. In the event a counterclaim is asserted against the plaintiff he is entitled to the same remedy and may bring in a third-party for the same reason which would entitle a defendant to do so.

The purpose of the rule is to avoid circuity of action and to permit a determination of all of the issues in one law suit and the decisions interpreting the rule which will now be discussed clearly indicates the attitude of the trial judges to the effect that they are attempting to advance its purposes.

The reported decisions interpreting this rule are quite numerous, but a recitation of the facts in some of the earlier decisions and a discussion of the principles involved serves to make them more understandable and more applicable to the problems of our practice. The cases will be considered as closely as it is possible to do so in chronological order to demonstrate the struggles of the courts and the lawyers during the period of infancy following the birth of the rule.

The first reported case is *Seemer v. Ritter*, 25 F. Supp. 688. The plaintiff, a resident of Virginia, instituted an action against the defendent, a resident of the State of Pennsylvinia. The defendant then asked for leave of the court to bring in as third-party defendants two residents of the State of Maryland. The plaintiff objected on the ground that the Middle District of Pennsylvania was not the proper venue of the action against the proposed third-party defendants. The court quickly disposed of this motion on the theory that the plaintiff had no right to raise this objection and that the proper parties to raise it were the third-party defendants themselves.

If this matter were now presented, the Court probably would rule that the proceedings were merely ancillary and that it had jurisdiction, assuming, of course, that proper service had been obtained upon the third-party defendants.

In the case of *United States v. American Surety Co. of New York*, 25 F. Supp. 700, an action was instituted by the United States to Use and for Benefit of Foster Wheeler Corp. v. American Surety Co. At the request of the defendant surety company, the American Basin Iron Works intervened and filed an answer denying the plaintiff's claim and also setting up a counterclaim. All the parties involved in the action with the exception of the United States are New York corporations. Judge Moscowitz of the District Court for the Eastern District of New York, in disposing of the matter, stated that while it was true that because of lack of diversity of citizenship, the American Basin Iron Works could not sue the Foster Wheeler Corp. in the Federal Court, that that fact did not deprive the Federal Court of jurisdiction because the main action was brought under a statute of the United States, and, therefore, he was not called upon to pass directly on the proposition of where in the absence of any Federal Statute sufficient ground would still exist for permitting the prosecution of the counterclaim.

In the case of *Dewey and Almy Chemical Company v. Johnson, Drakes and Piper*, 25 F. Supp. 1021, the plaintiff instituted a suit for alleged infringement of certain patents. The defendant moved for leave to file a third-party summons and complaint and for permission to have the third-party complaint stand as a counterclaim against the plaintiff. The plaintiff moved to have the third-party complaint dismissed as against it, but the court held that the third-party practice was

flexible and that it was perfectly proper to set forth the claim as it was pleaded.

A motion to dismiss third-party action in Federal Court for the Arkansas District was sustained in the case of King v. Shepherd, 26 F. Supp. 357, because the complaint disclosed that neither party was a resident of the state or district and that the cause of action arose wholly within another state. The facts as derived from the opinion discloses that the plaintiff was a resident of Fort Smith, Arkansas, and was injured on October 8, 1938, in an automobile accident occurring in the City of Fort Smith, Arkansas. The defendant was a citizen of the State of Oklahoma. The defendant filed a third-party complaint against its insurer, a resident of either Oklahoma or Missouri. In the first paragraph of the opinion it appears that the defendant was a citizen of the State of Oklahoma, but in the second paragraph it appears that the defendant, or third-party plaintiff, alleges that he was a citizen of the State of Missouri and that the third-party defendant, his insurer, was a citizen of the State of Oklahoma.

A situation of interest to plaintiffs' and defendants' attorneys is presented in *Crim v. Lumbermens' Mutual Casualty Co.* 26 F. Supp. 715. The plaintiff instituted an action against the defendant insurance corporation on the theory that a settlement had been effected with that company but that the settlement had never been completed and that by reason of said act and fraudulent misrepresentation on the part of said company the plaintiff had desisted from instituting an action within the time required by the Maryland Statute.

Defendant, before the time for answer had expired, moved ex-parte for leave to make the attorney for the plaintiff a defendant in the action and said leave being granted a third-party summons and complaint was served upon said attorney and upon the plaintiff. It was alleged in the third-party complaint that by reason of the negligence of said attorney, the plaintiff lost her cause of action. The third-party defendant then moved to dismiss the complaint. The question to be determined was whether or not a proper case existed for a third-party complaint. The court held that a proper cause of action was alleged and that the motion to dismiss should be denied.

Where the plaintiff and third-party defendant are residents of the same district an interesting jurisdictional problem arises as to whether the third-party action is merely ancillary to the main suit and thus no diversity of citizenship is necessary or it is independent and subject to the statutory limitations.

In the case of *Crum v. Appalachian Electric Power Co.,* 27 F. Supp. 139, the District Court of West Virginia held that the third-party proceedings are merely ancillary to the main action and do not necessitate jurisdictional or venue requirements. The court said, however, that before a matter of this kind can be finally determined a decision by the United States Supreme Court will be necessary, but, in view of the type of complaint formulated by the committee and adopted by the United States Supreme Court, that court, undoubtedly, will follow the decisions of the lower court.

The precise question was presented to the District Court of the Western District of Pennsylvania in the case of *Bossard v. McGwinn,* 27 F. Supp. 412. The plaintiff, a guest occupant in an automobile, was a resident of the State of Pennsylvinia, as was her host. She brought her action against the defendant, a resident of the State of Ohio. The defendant then moved to bring in the host as a third-party defendant, who, upon being served with a summons and complaint, appeared specially and moved to quash the service on the ground that there was no diversity of citizenship between the plaintiff and the third-party defendant, who were both residents of Pennsylvania.

The court ruled that under its conception of Rule 14 the third-party claim is not to be regarded as such a claim as required independent jurisdictional grounds, but was an ancillary claim to the original suit. This ancillary jurisdiction was recognized in equity actions in the Federal Court before the passage of the new rule.

Alexandrie vs. Hillman, 296 U. S. 222, 56 Supp. Ct. 204, 80 Lawyers' Edition, 192.

The rulings of the district judges of Pennsylvania and West Virginia are progressive and in keeping with the spirit of the rule. To hold otherwise could only serve to seriously circumscribe the utility of third-party practice. Our United States Supreme Court approved the rules and the forms and undoubtedly will affirm such decisions.

In the case of *Tullgren v. Jasper,* 27 F. Supp. 413, the plaintiff, a passenger in a taxi cab, which collided with a truck, brought an action against the cab driver, his employ-

er, the truck driver, his employer, and an association for whose use and benefit the cab was being operated. The association filed a third-party complaint against the Maryland Casualty Company, insurer of the motor truck. The Maryland Casualty Company then moved to dismiss the third - party complaint on the ground that the complaint failed to state a claim upon which relief could be granted; that it was not a proper party and could not be brought in under Rule 14; that the court was without jurisdiction in that the third-party plaintiff and Maryland Casualty Company were both residents of the State of Maryland, and, therefore, no diversity of citizenship existed.

The trial judge disposed of the matter by dismissing the third-party complaint on the ground that no cause of action could be asserted by the third-party plaintiff against the insurance company directly and that, therefore, it was not a proper party to be made a third-party defendant. This decision would not be helpful in Louisiana or Wisconsin, in which states the insurance company may be made a party to the action. While it was not essential to the decision as made by the trial judge, he did discuss at considerable length the matter of jurisdiction where there was no diversity of citizenship between the original defendant and the third-party defendant and raises the question as to whether or not this third-party practice is ancillary to the main suit.

In *F. & M. Skirt Company v. A. Wimpfheiner,* 27 F. Supp. 239 the plaintiff instituted an action for breach of warranty for certain washable cloth purchased by the plaintiff from the defendant. The action was instituted in the State Court and removed by the defendant to the Federal Court. A third-party complaint was filed and a third-party defendant filed a motion to quash the service of the summons and to dismiss the third-party complaint. The defendant is a New York corporation and the third-party complaint sets forth that the third-party defendant is a Rhode Island corporation and seeks to recover from the third-party defendant because the cloth was dyed by it and under a contract stipulated that it would be washable. Inasmuch as this action was in the State of Massachusetts and the summons was served in the State of Rhode Island the Court granted the motion dismissing the third-party complaint without prejudice.

The ruling is absolutely correct. This difficulty will not be experienced in most automobile cases because the cause of action undoubtedly will arise in the State in which the action is being prosecuted and by reason of the State Statutes permitting the Secretary of State or the Commissioner of Motor Vehicles to act as agents for service, jurisdiction can be secured on the third-party defendant.

In the case of *Duarte v. Christie Scow,* a corporation, 27 F. Supp. 895, the plaintiff instituted an action for personal injuries under the Jones Act. The defendant brought in the City of New York as a third-party defendant and the third-party defendant then moved for a dismissal on the ground that the complaint failed to state a cause of action. The motion was sustained and the court, by way of dicta, suggested that it would entertain a motion by the defendant dismissing the plaintiff's complaint against it.

Another decision by the District Court of Pennsylvania in *Kravas v. Great Atlantic and Pacific Tea Company,* 28 F. Supp. 66, presents two interesting propositions. The plaintiff instituted an action for personal injuries sustained when she fell in front of a store operated by the defendant corporation. The plaintiff was a resident of Pennsylvania and the defendant was a New Jersey Corporation. The defendant brought in Joseph Davis, record owner of the property, and Peoples Pittsburgh Trust Company, mortgagee of the premises. The third-party defendants were citizens of Pennsylvania.

A motion to dismiss was made on two grounds: First, that the court was without jurisdiction of the third-party complaint because both the plaintiff and the third-party defendant were citizens of Pennsylvania, and, secondly, because the claimed liability on the part of the third-party defendant arose on contract which is a separate and distinct cause of action from the one forming the basis of plaintiff's suit.

The court disposed of both motions adversely to the third-party defendant. It decided the first part of the motion by affirming its decision in *Bossard v. McGwinn,* supra, and further held that it was immaterial whether the liability of the third-party defendant arose out of contract because under the Federal Rule the defendant may bring in a third-party "who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him."

In the case of *Satink v. Holland T. P.,* 28

F. Supp. 67, we find an action instituted by the plaintiff against a township for injuries arising out of the improper construction and maintenance of a highway. The plaintiff was a resident of New York and the defendants were residents of New Jersey. The defendants moved to bring in the Lehigh Valley Railway Company and one of the defendants moved to bring in the owner and driver of the car in which plaintiff was riding at the time of the accident. The plaintiff objected to the granting of the motion on the ground that the owner and driver of the car in which she was riding, and the plaintiff, were residents of the same State and because the rule does not permit a joinder of third-party defendant where the substantive law of the State does not permit reimbursement, indemnifcation or contribution as between tort feasors.

Apparently, during the progress of the case, the defendants abandoned their contention that the court was without jurisdiction because of any lack of diversity of citizenship. The court permitted the joinder of the parties and permitted the third-party complaint to stand on the theory that they alleged causes of action which would have entitled the plaintiff to have sued them originally, and, therefore, regardless of the State Law which did not permit contribution, they were, nevertheless, proper defendants in the action.

The right of the defendant to bring in a third-party who "is or may be liable" either to the original defendant or to the original plaintiff as distinguished from the New York State practice which merely allows a defendant to bring in a third-party against whom there is liability over, was recognized in *Lensch v. Bonshell Carrier Co., Inc.*, 1 F. R. D. 200.

A third-party complaint which prayed for the adjudication of a primary right as against a third-party defendant as well as a claim for contribution was permitted to stand, although the lex loci delicti would not permit a recovery for contribution,*Sklar v. Hayes*, 1 F. R. D. 415.

This same case was before the court again and is reported in 1 F. R. D. 594. In the later decision, the court encourages liberality of pleading where no prejudice results and permitted the plaintiff to amend the complaint to state a cause of action against the third-party defendant after a new trial had been granted.

A motion for leave to bring in a third-party defendant must be made timely. Such a motion made within one week of trial date was properly denied where the granting of such a motion would result in a delay of the trial. *United States v. Shuman*, 1 F. R. D. 251.

In a decision vacating an order granting leave to file a third-party petition and striking it from the record, Judge Donohue of Omaha in *McPherrin v. Hartford Fire Insurance Company*, 1 F. R. D. 88, stated that some of the purposes of the new rules were as follows:

(a) Simplification of procedure.
(b) Speedy administration of justice.
(c) Reduction of the costs of litigation.

From a reading of the facts contained in the opinion it appears that the court's langauge contradicts his expressed purposes. The firms of two of our distinguished members from Omaha were involved in this protracted litigation and if they are here, they may be able to enlighten us.

The C. C. of A., 7th Circuit in *Heitman v. Davis*, 119 F. 2d, 975, has ruled that the stockholders of an insolvent national bank could not under the federal rules, bring in the only creditor of the bank as a third-party defendant, in an action by the receiver of the bank against stockholders to collect amount of assessment, for the purpose of showing that assessment was unnecessary because bank was not actually indebted to the creditor.

An interesting factual situation was presented to the C. C. of A., 1st Circuit in *Moreno v. United States*, 120 F. 2d, 128. Plaintiff instituted this action to collect under a war risk policy. The defendant brought in a Mrs. Hathurst who had been designated by plaintiff's husband as a substituted beneficiary. Plaintiff then moved to amend her complaint and allege a cause of action for alienation of affections. The court affirmed the trial courts decision holding that cause of action for alienation of affections was not a proper one in the action for collection of the proceeds of the insurance policy.

It is interesting to note that in both of the last two decisions handed down by the appellate court as late as May and June of this year, that permission to file a third-party complaint was denied. However, the situations presented clearly indicate the correctness of the ruling and in no way affects the conclusions now stated.

1. The granting of the motion for permission to file a third-party complaint rests in the sound discretion of the trial judge.

2. The judges have been very liberal in their application of the rule.

3. The third-party proceedings are merely ancillary to the main suit and the requirements of diversity of citizenship and an amount in excess of $3,000.00 need not be present.

4. In states where the right of contribution does not exist the joining of a third party defendant has been permitted but it has not been determined what the effect will be if the plaintiff refuses to amend his complaint. In the light of the court's decision in *Erie v. Tompkins*, it would appear that the third-party action would be a futile gesture in those states which do not permit the right of recovery by right of contribution.

5. Some decisions by the United States Supreme Court will be necessary to clarify the practice.

6. The application of the rule by the district courts is in keeping with the modern trend of legal developments.

Floor Discussion by George E. Heneghan, of Paper of John A. Kluwin

WHEN I was asked to take part in this Symposium I thought it advisable to resort to the dictionary to find out just what a symposium is. We have always heard that the Greeks have names for everything, and I was somewhat surprised to learn that in Ancient Greece a symposium was a drinking feast. Following the drinking a free interchange of ideas took place and, therefore, we have the background of what is known as a symposium of our time. I am sure you will all agree that if the ancient custom were followed, this discussion should take place after one of our cocktail parties and I know we would not want for differences of opinion.

We have just listened to a well prepared paper by Mr. John A. Kluwin, of the Wisconsin Bar. It is apparent that Mr. Kluwin has given a lot of study to the third party practice under the Federal Rules and has brought to our attention a great many cases in which Rule 14 has been considered. On a casual reading the rule does not appear to be complicated, but on attempting to apply it to a given state of facts, real complications arise. Professor Douglass Poteat, of the Duke University Law School, in an address delivered at Asheville, North Carolina, said:

> "For if one will scratch the surface of the simple language of Rule 14, on third party practice, and push down to the cluster of brain-twisting combinations and variations which lie beneath, he will find, I believe, a power to perplex nowhere surpassed in the whole body of the Rules."

The purposes which the Supreme Court undertook to serve by the adoption of the Rule are, as set forth by Mr. Kluwin, as follows:

(a) Simplification of procedure.
(b) Speedy administration of justice.
(c) Reduction of the cost of litigation.

Judge Donohue, in the McPherrin case cited by Mr. Kluwin, held that Rule 14 was formulated and adopted in keeping with the purpose of all of the Rules, that is: That is should be applied if it will simplify the procedure, secure a speedy trial, terminate the litigation and reduce costs.

We find from Commentaries under the Rule in U. S. C. A., attributed to Professor E. R. Sunderland, member of the Supreme Court Advisory Committee:

> "That under third party procedure a surey may bring in his principal, an agent may bring in his principal, a lessee sued by a lessor on a covenant may bring in his sub-lessee; a covenantor, sued for breach of warranty of title, may bring in his own covenantor; a city, sued for injury caused by a defective sidewalk, may bring in an abutting owner; a contractor, sued for a wrongful act of a subcontractor, may bring in the latter; a joint obligor who owes contribution may be brought in, and a joint tort feasor may be brought in if there is contribution."

I was told that a third party plaintiff moved to bring in his principal—and princi-

pal was spelled "principle"—and opposing counsel facetiously suggested that the phrase, "if any," should be interlined after "principle." He blamed the spelling on the stenographer, the customary practice in all districts.

Rule 14 may be termed a broadening of the old common law rule of "vouching in" another person. We are all familiar with the fact that at common law, and by code in at least one of the states, a defendant who has been sued on a cause of action may "vouch in" to defend in his name another party liable to him, and the results of the trial are conclusive upon the vouchee.[1]

The statute of Georgia authorizing a defendant to vouch another against whom defendant has a remedy over in the court is merely a statement of a well known common law doctrine and was not intended to have any unusual limitations or to give the doctrine any additional scope.[2]

The Voucher to Warranty has been termed the calling in of one who has warranted lands by the party warranted to come and defend the suit for him.[3]

The doctrine of vouching was applied principally to those cases where suit is brought on a paramount claim against one entitled to the benefit of any of the covenants of title and especially the covenants of warranty, and defendant can, by giving proper notice of the action to the party bound by the covenants and requesting him to defend it, relieve himself from the burden of being compelled afterwards to prove in an action on the covenants the validity of the title of the adverse claimant. This procedure has frequently been used in actions, for instance, in actions by a depositor against a bank which cashes a forged check. The bank serves notice upon the last endorser to come in and defend the suit in the name of the bank and when service of such notice is had, the endorser is conclusively bound by the issues involved in the suit against the bank, whether he comes in and defends or not.

Rule 14 provides that a defendant, as a third party plaintiff, may move "to serve a summons and complaint upon a person not a party to the action who is, or may be, liable to ***him***, or to the ***plaintiff***, for all or part of the ***plaintiff's claim against him***. Obviously, the language is plain that two classes of persons may be brought in, viz: one class who may be liable to the defendant, or third party plaintiff, and one class who may be liable to the plaintiff. No particular difficulty arises as to the second class, i. e., those who may be liable to the plaintiff, but difficulties do arise as to those in the first class who may be liable to the defendant or third party plaintiff. It is necessary that the liability of the third party defendant, whether to the third party plaintiff or to the plaintiff, be directly connected with the plaintiff's claim against the defendant. It stands to reason that a third party defendant may not be brought in on a motion of the defendant, the third party plaintiff, unless the liability of the third party defendant arises out of the same subject matter on which plaintiff's claim is based. In fact, the liability of the third party defendant must be a liability of all or part of the plaintiff's claim against defendant and not simply a liability to defendant.

It is evident that under the Rule there is not going to be uniformity in all the states as to the right to bring in third party defendants. The Federal Courts must follow the Federal Rules as to procedure, but since the decision in the Erie Railroad case,[4] they must follow the substantive law of their respective states in determining whether there is a right to indemnity, contribution, etc. Obviously, the decisions of the Federal Courts of other states are not even persuasive, much less controlling, as to third party practice unless the substantive law of the other states is the same as the substantive law of your state.

Some of the District Courts inferred that only those persons may be brought in as third party defendants against whom plaintiff could have proceeded in the first instance, but the Rule says that those persons may be brought in who may be liable to the defendant or to the plaintiff.

In the case of *Burris vs. American Chicle Co.*, (D. C. N. Y.)[5] in an action for personal injuries sustained as a result of alleged failure to comply with the law and regulations relating to safety devices intended for the protection of persons engaged in window cleaning, the defendant moved to bring in Ashland Window and House Cleaning Co., Inc., which had contracted with the defend-

[1]Morgan v. Haley, 58 S. E. 564, 13 L. R. A. (N. S.). 732.
[2]Loeb v. May, 198 S. E. 785.
[3]Blackstone's Commentaries, 300.
[4]Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.
[5]29 Fed. Sup. 773.

ant to clean its windows and to furnish scaffolds, ladders and suitable equipment. The plaintiff resisted the application on the ground that it had no right of action against the Ashland Window and House Cleaning Co., Inc., but the court granted the motion.

In the case of *Kravas vs. Great Atlantic & Pacific Tea Co.*, (D. C. Pa.),[6] cited by Mr. Kluwin, the court permitted defendant in a tort action to bring in as a third party defendant one who was liable to defendant in contract, although there was no privity between the plaintiff and the third party as to the contract.

In the case of *Gray vs. Hartford Accident & Indemnity Co.*, (D. C. La.),[7] the court referred to as a "dragnet provision" that part of the Rule providing that persons may be brought in who may be liable to the defendant or to the plaintiff for all or part of the plaintiff's claim against him, and stated that the Rule was clearly indicative of the purposes of the writers of the Rules to encompass any and all diversified ramifications growing out of, or connected with, any cause of action. In fact, the Rule provides that third party defendants may proceed against any person not a party to the action who is, or may be, liable to him or to the third party plaintiff for all or part of the claim made in the action against the third party defendant. The Rule does not say so, but I do not see anything to hinder the procedure from being continued ad infinitum. I will confine my discussion, however, to cases which do not continue beyond the first third party defendant.

It has been held, and properly so, in districts where the state law does not authorize a suit directly against the liability insurance carrier that one defendant may not bring in the liability insurance carrier of his co-defendant. If the insurer assumes the defense, obviously its attorneys will not bring in insurer. However, in a case where an insurance carrier disclaims and the insured assumes the defense of the case himself, would he not attempt to bring in his insurer who "may be liable to him * * * for all or part of the plaintiff's claim against him?" I know of no instance where that has yet been attempted, but the language of the Rule is certainly broad enough to conceive more than a bare probability that that may be done. The plaintiff could not bring in the insurer, there being no privity between the plaintiff and the insurer, but the text of the Rule says that the defendant may bring in any person who may be liable to *him* for all or part of the plaintiff's claim agianst him. I am not unaware that under Rule 42, the Court, to avoid prejudice, may order a separate trial of a third party claim, and under the facts stated it certainly would be wise for the insurer to move for a separate trial of such a third party claim against it. As a matter of fact, such a situation might be beneficial to insurer in the event a separate trial is granted, as it would probably be more advantageous to it to have its liability tried in a separate proceeding in the Federal Court, rather than to be required to face a trial in an action instituted by the insured against it in the State Court.

I do not doubt but that the day is not far distant when we will find that the courts have had to solve the problem of whether an insurer who has disclamied may be brought in by the defending insured on the theory that the insurer is liable to him, despite the fact that plaintiff except in a few states where it is permitted by statute, could not institute any action directly against the insurer. It is evident that Rule 14 confers on the plaintiff in his original complaint no right to join any person not liable to him under the substantive law of the state where the action accrues and the right to bring in third parties is a right of a defendant and not of a plaintiff. If the plaintiff has no right to join the insurer under the substantive law of the state, he acquires no such right under Rule 14.

It will be noted that the Rule provides that the plaintiff may amend his pleadings to assert against the third party defendant any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant. It, of course, makes no provision for amendment of pleadings by plaintiff in instances where the third party defendant could not have been joined originally as a defendant. How could plaintiff amend his complaint to assert a claim against a third party defendant who could not have been originally joined as a defendant? If he has no such claim under the substantive law of the state, obviously Rule 14 would not give him one.

Is the plaintiff required to amend his complaint to assert a cause of action against the

[6] 28 Fed. Sup. 66.
[7] 31 F. Supp. 299.

third party defendant against the will of plaintiff?

In the case of *Schram, Receiver, v. Roney* (D. C. Mich.),[8] it was admitted that the plaintiff could have made the third party an original defendant but did not desire to do so, and the court said, l. c. 462:

> "Can we now, then, force plaintiff, Bank Receiver, to accept as party defendants and thus encumber his own litigation, other defendants with whom he desires not to be embroiled but who were brought in to settle the controversy that is specifically one between the two sets of defendants? True, the Receiver in the case at bar has not amended his pleadings and he has likewise failed to object to the third party defendants being joined, but the result is the same. He gets someone as defendants that he evidently didn't, or does not now, want.
>
> "Ordinarily, we would say "No." * * * *
>
> "We feel that Rule 14 seeks to accomplish a purpose worthwhile and the trend of the District Court's decision throughout, permitting third party plaintiffs to bring third party defendants into the Federal Courts even though they could not have done so by direct action, but where the original action is jurisdictionally sound, should not be considered circumvention.
>
> "We admit that the question is a close one, but it is apparent that the Rule has a tendency to eliminate to some extent multiplicity of suits, and that until this Court is bound by precedent of the Court of Appeals, which decision may come before this case is actually tried, we will deny the motion to dismiss."

Suppose the court grants defendant, as third party plaintiff, leave to bring in a third party defendant who could have been joined originally as a defendant and plaintiff refuses to amend his complaint to state a cause of action against such third party defendant. May plaintiff refuse to do so and not subject himself to a Motion to Dismiss? The Rule provides in such instances that the plaintiff *may* amend his pleadings, but it does not say he *shall* do so.

In the case of *Malkin v. Arundel Corporation et al* (D. C. Md.),[9] an automobile being driven by Anna Malkin was in a collision with an automobile operated by defendant F. A. Rhoad as an alleged agent of the Arundel Corporation. The occupants of the Malkin automobile suffered injuries as a result of which they separately brought suits against Rhoad and the Arundel Corporation. The defendant obtained an order to make Anna Malkin, the driver of the Malkin automobile, a third party defendant. She filed a motion to vacate this order before any amended complaint had been filed by the plaintiff pleading a cause of action against her. The court, at l. c. 951, said:

> "I conclude that the motion to rescind the order for third party complaint against Anna Malkin should not be absolutely, but only conditionally, granted. It should, however, be granted unless within ten days after service of notice on the plaintiff or his counsel the plaintiff amends his complaint to assert a joint claim against Anna Malkin with the original defendants. I am informed that Judge Coleman, after consideration, passed a similar order recently in a similar case, but without written opinion. Counsel may present an order in accordance herewith."

In the case of *Connelly v. Bender et al* (D. C. Mich.),[10] plaintiff filed her declaration claiming damages for wrongful death of her decedent resulting from an automobile involving defendants' motor vehicle and a locomotive of the Grand Trunk Western R. R. Co., on which locomotive plaintiff's decedent was riding at the time of the accident. At a pretrial hearing defendants moved to add the Grand Trunk Western R. R. Co. as a third party defendant. Thereupon plaintiff's counsel announced that plaintiff had signed a Covenant Not to Sue said Railroad Company, and declined to amend the complaint and claim relief against the Railroad Company. The Court stated:

> "Plaintiff asserts no claim against the proposed third party and the addition of such party at this time would cause delay and expense. It, therefore, follows that the motion to add said Railroad Company as a third party defendant must be, and it hereby is, overruled."

But let us see how a similar state of facts fared in Louisiana. In the case of *Gray v. Hartford Accident & Indemnity Co.*, (D. C.

[8] 30 F. Supp. 458.
[9] 36 F. Supp. 948.
[10] 36 F. Supp. 368.

La.),[11] after the defendant insurer successfully moved to have a third party defendant and its insurer brought into the case, the third party defendant secured a Covenant Not to Sue from the plaintiff and the third party defendants moved to dismiss the case as to them for the reasons that: 1st, that neither the original plaintiffs nor the third party plaintiff set forth any legal claim against the third party defendants; and, 2nd, because a settlement was made and Covenant Not to Sue executed. The court held that even though the plaintiff should not have set forth a claim against the third party defendants, it is sufficient that the third party plaintiff should establish a legal claim against the third party defendants. A reading of the opinion discloses that in Louisiana the plaintiff has no uncontrolled right of election of defendants. The court argued that if the motion to dismiss be sustained, the plaintiff might recover a judgment for the entire injuries against the defendant and the plaintiff would be unjustly enriched by what he already received, and apparently proceeded on the theory also, in analyzing the facts, that joint tort feasors are liable for pro rata shares of judgments and that a plaintiff by compromising with one joint tort feasor could not preclude the other joint tort feasor from asserting a claim as a third party plaintiff against the tort feasor who compromised his claim with plaintiff. The court overruled the motion to dismiss and stated that by overruling the motion, the procedural law of the Federal Courts and the substantive law of the state of Louisiana dovetail perfectly. Such a motion in states where the substantive law as to rights and liabilities of joint tort feasors is different from Louisiana, would likely be sustained, but in such instances the jurors would be advised of the amount of settlement and would be instructed that they could take it into consideration in rendering their verdict.

In most of the states the liability of tort feasors is joint and several. In those states has not the plaintiff a controlled right of election of defendants? Under the substantive law of those states each tort feasor is liable to the plaintiff for the entire damage of plaintiff and plaintiff may sue one or all.[12] Can the Federal Courts by procedural law force him to proceed against certain tort feasors against his will and contrary to his rights under the substantive law of the state? You will notice I have asked a lot of questions, but have cited cases answering only a few of them. The answers to a majority of them have not as yet been judicially determined, and we will be required to await their determination by decisions which take into consideration the substantive law of our own states.

In analyzing Rule 14 it is obvious that a great many problems are going to arise which have not even yet been before the District Courts so as to be reported in Federal Supplements. As yet no case involving interpretation of Rule 14 has been decided by the United States Supreme Court and, in fact, I have only found one case where the Rule has been considered by the United States Circuit Court of Appeals. *Barnard-Curtiss Company v. Maehl.*[13] I have do doubt but that the United States Supreme Court will do everything within its power to effectuate the purpose of the Rules. Until a judicial interpretation of Rule 14 by the United States Supreme Court is had, we will not be 1941) 117 Fed. (2d) 7.
certain of the scope and limitation of the Rule. Even when the United States Supreme Court has construed the Rule, such construction must be considered in the light of the substantive law of the state where the issue involving the Rule arose. I would not want to prejudice the purpose for which the Rules were created by referring to it as a noble experiment, but I do feel that the purpose is an exemplary one and we should do everything in our power to serve the purposes behind the creation of the Rules.

I desire to congratulate Mr. Kluwin on his effective paper and to thank you for the courtesy you have extended to me.

[11]32 F. Supp. 335.

[12]Berry v. K. C. Public Service Co. (Mo.), 108 S. W. (2d) 98.

[13]Barnard-Curtiss Co. v. Maehl (C. C. A., Mont.,

Report of the Committee On Casualty Insurance

THE Committee on Casualty Insurance has chosen as its subject for this report the rights and duties of an insurer after judgment where the judgment is in excess of the policy limit. This subject was undertaken as a result of the recommendation of last year's committee.

The report of last year's committee, as the members of the association will remember, dealt with the liability of a casualty insurer beyond the monetary limits of its policy. This report, therefore, supplements the report of last year's committee and the two reports taken together cover the question of liability in excess of the policy limit from the inception of the claim to final determination by the court of last resort.

The scope of this report is intended to cover only the rights and duties of an insurer as respects appeal where the judgment exceeds the limit of the policy.

To a limited extent the general rules applicable to appeals by an insurer in the name of the insured are discussed as to their bearing upon the particular subject of this report. All conclusions arrived at by your committee, however, apply only to problems involving judgments in excess of the policy limit.

The subject has been carefully covered state by state and an effort has been made to cover all of the cases in the country specifically involving the questions presented. Because of the scarcity of decisions in many sections of the country, the cases cited here-in are not cataloged state by state as in last year's report.

1. The effect of the exercise of the right of appeal upon the liability of an insurer where the judgment exceeds the limit of the policy.

A. In general where the terms of the policy give the insurer the right to defend, the insurer has the right to appeal, even though the judgment is in excess of the policy limit. The exercise of such right does not in and of itself render the insurer liable for an amount in excess of its policy. However, the insurer must exercise such right free from bad faith or negligence and the rules promulgated by last year's committee with reference to bad faith and negligence prior to judgment being rendered have equal application after judgment.

With the exception of the State of Vermont there would seem to be no statutory limitation upon the right of appeal by an insurer where the judgment is in excess of the policy limit. The State of Vermont has a statute which has not been interpreted and which we list herein without further comment. *Section 7087 of The Public Laws of Vermont* requires that every policy contain the following provision:

> "No limitation of liability in this policy shall be valid if, after a judgment has been rendered against the insured in respect to his legal liability for damages in a particular instance, the company continues the litigation by an appeal or otherwise, unless the insured shall stipulate with the company agreeing to continue such litigation."

The general rule of the right of appeal is recognized in the case of *Neuberger vs. Preferred Accident Insurance Company of New York,* 18 Ala. App. 72, 89 So. 90. Involved there was a $5,000.00 automobile liability policy and a trial resulting in a judgment for $6,500.00. The court wrote:

> 'The defendant had the right to direct the litigation, that is, if it cared to take an appeal, which right we take it was reserved in the contract of insurance."

The case of *Powers vs. Wilson,* 139 Minn. 309, 166 N. W. 401 discusses the right of appeal in general. In that case there was a verdict for $12,500, the policy limit being $5,000.00, and appeal was taken without a supersedeas. Thereafter plaintiff entered judgment and issued an execution under which she seized insured's property. Insured then made an agreement for settlement conditioned upon insurer's paying amount of policy. Insurer refused and continued appeal to unsuccessful conclusion. In this garnishment action against insurer for the policy limit, the court did not agree with insurer's contention that insured had refused to post a bond or had made a settlement in violation of the terms of the policy. The court after stating that insured had not refused to furnish supersedeas held:

". . . . However this may be, the policy provides that the company shall defend the suit 'at its own cost', and contains no provisions requiring the assured to furnish a bond of any kind, and nothing which can be construed as forfeiting his rights under the policy for failure to do so . . . This tentative settlement (by the insured) did not interfere with the management and control of the litigation by the company, nor hinder it in any manner from containing the litigation to the end. The company in fact did continue the litigation to a final conclusion without hindrance or interference of any kind, and we fail to see wherein the making of this conditional agreement impaired or affected its rights in any way."

Case of *Grandhagen vs. Grandhagen* (Wis.) 225 N. W. 935 holds that the liability of the insurer to pay a judgment gives the insurer the right to continue the appeal in the name of the insured.

See also *Employers Mutual Liability Company vs. McCormack* 195 Wis. 410, 217 N. W. 739.

(The judgment in each of the above cases was within the policy limit.)

B. The effect of a request for payment or objection to appeal upon the right of appeal as respects a judgment in excess of the limit of the policy and the liability of an insurer therefor.

The request of a policyholder for payment of the judgment up to the limit of the policy or the objection to an appeal does not affect the right of the insurer to appeal, nor does it affect the liability of the insurer in excess of the policy limit. The case of *Davis vs. Maryland Casualty Company* 16 La. App. 253, 133 So. 769 holds that the insurer had the right to appeal if acting in good faith, even though there was a settlement opportunity within the policy limit and a request for a payment by the insured. The substance of the decision is found in the following paragraph:

"The only allegation of bad faith alleged in plaintiff's petition is that insurers appealed the case of Hoges v. Davis in an attempt to coerce Davis into paying a part of the amount agreed on as a compromise. The insurers had the right to elect (given them by the policy), to contest the claim or to settle it, and they elected to contest it rather than pay the full amount of the policy. Does that show bad faith? We think not. All that is required of the insurer is good faith in its actions in contesting a claim, and to say that, because they took an appeal they have acted in bad faith, would be to penalize them for exercising a contractual right. It is not unusual for the appellate courts to reverse a judgment of the lower court even on facts, or to reduce or increase the amount of the award in the lower court; and for us to hold that because defendants did appeal, they are liable for the difference between the judgment finally rendered and the compromise offered would be to hold that the insurers were obligated to settle all claims, within the amount of the policy, before final determination, and that whenever it appealed, it did so at its peril. It would be to read out of the contract between the insurers and the assured the very clause placed therein to protect the insurers from collusion and fraud between the assured and a third person who might be injured."

See also Georgia Casualty Company vs. Cotton Mills Producing Company 159 Miss. 396, 132 So. 73. In that case, an employers' liability policy with a $10,000.00 limit, was issued to Cotton Mills Producing Company. An employee was injured, and on suit being filed against the assured, the insurer defended the case with counsel of their selection. The case was tried before a jury, resulting in a verdict of $12,500.00. A motion for a new trial was then filed, stressing the fact that the verdict was excessive, but was overruled. The attorneys for claimant then offered to accept $9,000.00 and court costs in full settlement of the judgment. The assured strongly urged the acceptance of this settlement, and proposed to contribute towards the compromise the sum of $500.00 and accrued court costs. The attorneys for the insurer advised their client to accept the settlement, but also gave their opinion that the verdict was excessive and would be reduced $2,500.00 to $5,000.00 by the Supreme Court. The insurer rejected the offer of settlement and directed the attorneys to proceed with the appeal, and the judgment was eventually affirmed. The Court found as a fact that the insurer acted in good faith, and that the case was handled skillfully throughout by the attorneys.

In reversing a decision against the insurer

by the lower court, the Supreme Court of Mississippi held:

"In this case there is no hint of fraud. The lawsuit was conducted in good faith; there was no arbitrary action on the part of the insurer in the performance of its contract there was no coercion; there is no public policy of the state involved, and there is no statute affecting this situation. The provision in the contract with reference to settlements is, in our opinion, a reservation in the interests of the insurer, and was not included in the contract to defend the suit. We are therefore of the opinion that no tort arises from the faithful performance of the contract. There was no duty to settle, consequently no negligence in failing to do so; although it now appears, after the termination of the litigation, that it would have been to the interest of both the insured and the insurer to accept the proposed compromise.

"Negligence cannot be predicated upon a failure to exercise an option or reservation made for the benefit of the optioner. This view is directly and affirmatively supported by the following cases: Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland, 162, Wis. 39, 155 N. W. 1081, Ann. Cas. 1918C. 399; Wynnewood Lbr. Co. v. Travelers' Ins. Co., 173 N. C. 269, 91 S. E. 946; Best Bldg. Co. v. Employers' Liability Assur. Corp. 247 N. Y. 451, 160 N. E. 911, and cases therein cited. We are also of the opinion that all those cases which hold that there is no liability in an action on the contract, cited supra, are in point.

"We therefore conclude that the appellant is not liable for damages because of negligence, having fully performed its contract in accordance with its terms."

Other decisions on this point are *American* Surety Company vs. Ballman, 104 Fed. 634 *and The Commercial Casualty Insurance Company vs. Fruin-Colnon Contracting Company, 32 Fed. (2nd) 425.*

An examination of the above cases, together with cases hereinafter cited show that under policy provisions giving the insurer the right to defend in the name and on behalf of the insured suits brought against him, the insurer has the right to appeal. This right arises by implication from the contractual right to defend the action, and the right may be exercsied even though the insured demands payment or objects to the appeal being taken.

II. THE DUTY TO APPEAL

Where an insurer assumes the control and defense of an action and a judgment results in excess of the policy limit, the question of the duty to appeal arises. The authorities are in conflict as to the existence of such duty, some jurisdictions holding there is a duty, violation of which may give rise to additional liability to the extent of attorneys' fees and court costs incurred by the insured in appealing; others holding that there is no duty to appeal, and that the insurer may pay the policy limit and abandon the case even though there is a request to appeal by the policy holder.

Generally with regard to the duty to appeal see the case of *Boling vs. Ashbridge, 111 Okla. 66, 238 Pac. 420.* In this case the policy limit was $5,000.00. After a judgment was rendered against the assured in the sum of $20,000.00, an offer of compromise of $6,000.00 was made. The assured requested the insurance company to pay $5,000.00 of this amount (its policy limit) and assured would pay the remaining $1,000.00. The Company, however, refused to pay more than $1,500.00 toward the settlement. (The opinion in one place says $1,500.00, and in another place says $3,500.00). Counsel for the insurance company advised against an appeal of the case, claiming there was no hope for a reversal of the judgment. Nevertheless, the assured took over the case, and herself prosecuted the appeal. After losing the appeal the assured sued the insurance company for her attorneys' fees and costs incurred as a result of the appeal. The court held that the assured could not recover such costs from the insurance company, and that the company's liability was limited to the $5,000.00 provided for in the policy. In so holding, the court says, at page 423:

"In view of the fact that the assurer in the case under review came in and defended in the trial court, it was not liable for attorney's fees of assured's private counsel, employed in the case, and, as the assurer insisted that the assured do not appeal from the judgment, but effect a compromise and pay the money agreed upon, the assurer is not liable for the attorney's fee and costs of appeal.

"Counsel for assured insists it was the duty of the assurer to appeal the case, but this would have been manifestly unjust, as the assurer would have been required to

furnish a supersedeas bond in the sum of $40,000.00, and, upon affirmation of the judgment, to pay $20,000.00, when the liability under the policy did not exceed $5,000.00 plus costs of suit."

The court indicated that when the offer of compromise in the sum of $6,000.00 was made, and the insurance company refused to pay more than $1,500.00 on a $5,000.00 policy, the proper procedure would have been for the assured to pay the sum of $6,000.00 in settlement of the judgment, and then sue the insurance company for the $5,000.00 which it was obligated to pay under the terms of its policy.

The policy involved in this case contained a so-called "no action" clause, which required the assured to first pay or satisfy the judgment before requiring the insurance company to indemnify her for moneys actually paid out. In other words, it was a policy of indemnity, as distinguished from a policy of liability. The court relied upon this "no action" provision of the policy in holding that the assured should have paid the amount of the settlement and then sued the company for the $5,000.00, instead of appealing the judgment. The case indicates that, at least under this type of a policy, there is no duty upon the insurance company to appeal from the judgment, even though it is in excess of the policy limit.

See also the case of *Boling vs. New Amsterdam Casualty Company, 173 Okla. 160, 46 Pac. (2nd) 916.* This case is cited in the report of the casualty committee for 1940, and involves principally the question of the duty of the insurance company to settle up to its policy limit. The facts of the case are the same as those set out above in *Boling vs. Ashbrige, supra,* as this case arose out of the same litigation. The assured sued the insurance company for the damage caused to her by the failure and refusal of the insurance company to pay up to its policy limit of $5,000.00 in settlement of the $20,000 judgment for $6,000.00. Such damage included the sum of $2,000.00 as costs of prosecuting the appeal which she took over after the refusal of the insurance company to contribute its policy limit toward settlement, and the excess which she was required to pay above the amount for which the suit could have been settled. The Appellate Court, reversing the decision of the trial court, which had sustained a demurrer to plaintiffs petition, held that the petition stated a cause of action against the insurance company. The court said it was incumbent upon the insurance company to do one of two things: (1) contribute up to the amount of its policy limit toward settlement; or (2) appeal from the judgment in the event it found probable grounds for reversal. The court felt that other action on behalf of the insurance company, or the failure to follow one of these two courses, would support a conclusion of bad faith. In so holding, the court said on page 918:

"It seems reasonable, in view of the contractural right reserved to appellee to conduct the litigation in defense of liability and to make settlement, that at the time the judgment for $20,000 was rendered in the trial court, the burden was upon it to appeal from the judgment in the event it found probable grounds for reversal or to evidence its intention to pay to the extent of its liability. The appellant was fraught with much difficulty. If she voluntarily satisfied the judgement, there was danger of being impailed upon the provision of the policy which relieved the assured of liability in such event. If she did nothing, the judgment became final in full measure.

"The appellee then sought to coerce the appellant to assume a major portion of its liability, and this has been held to constitute bad faith. It is so irrespective of whether the character of the policy of insurance is indemnity or liability."

The case of *Lumbermens Mutual Casualty Company vs. McCarthy (N. H.) 8 (2nd) 750* upholds the right of the insurer to pay the policy limit after judgment in excess of the policy limit and abandon the case without any further duty to appeal.

Manheimer Brothers v. Kansas Casualty and Surety Company, 149 *Minn.* 482, 184 *N. W.* 189, holds that the insurance contract obligated the insured to defend all actions brought against the insured and the duty created by this contract was to conduct the whole defense and, if necessary, to vindicate the rights of the insured, to prosecute an appeal to the Supreme Court. The Minnesota case limits the insurer's liability to the face of the policy and holds that failure to defend by appeal does not increase its liability over the face of the policy, but would subject it to liability for costs and attorney's fees on appeal. This

case, therefore, differs from the Oklahoma case of *Boling vs. Ashbridge, supra.* in that the Oklahoma case holds that the failure to appeal does not give rise to liability in excess of the policy limit even to the extent of costs and attorneys' fees occasioned by the insurer on appeal.

In 1932 the Illinois Appellate Court held:

> "Under the clause of the policy, the defendant (insurer) was obligated to defend Scott (additional insured) in the personal injury action and was equally obligated to perfect the appeal after the judgment."

Scott vs. Inter Insurance Exchange, 267 Ill. App. 105, affirmed, 352 Ill. 572. Sessel vs. New Amsterdam Casualty Insurance Company 204 S. W. 428 (Tenn.) Under an indemnity policy by which insurer agrees to defend suits brought against the insured, where the judgment against the insured exceeds insurer's policy limit, the insurer must either provide the required supersedeas bond and take an appeal or pay the agreed liability. In this case the judgment was in excess of the policy limit, and a finding was made for the limit of the policy and the court costs.

The case of *Schnieder vs. Ft. Dearborn Casualty Underwriters, 258 Ill. App. 58,* held the refusal or failure of an insurer to appeal does not alone give the insured a right of action for damages. The discussion by the court indicates that the duty to appeal is not a positive duty, but that where a definite agreement is made by the insurer to appeal, a positive duty would then arise, the violation of which would give rise to additional liability. This case gives a rather complete discussion of the circumstances wherein failure to appeal can give rise to additional liability.

The problem is further discussed in the case of *Lincoln Park Arms Building Corporation vs. U. S. F. and G. Company, 287 Ill. App.* 520, 5 *N. E.* (*2nd*) 773:

> "An agreement in an insurance contract to defend a suit does not necessarily raise an obligation to prosecute an appeal but it has been held under the universal doctrine of good faith and fair dealing in the performance of contracts that an insurance company, by reason of its conduct may be held liable for the expenses of an appeal assured was compelled to prosecute upon refusal of insurer to do so."

In the case of *Brassil vs. Maryland Casualty Company,* 210 *N. Y.* 235, 104 *N. E.* 622, a casualty insurance company whose contract gave it the option of defending any suit, settling it at its own cost or paying the stipulated indemnity, and provided that the insurer could not settle any claim except at its own cost or incur any expense without insured's consent, refused injured person's offer for settlement for $1500.00, the amount of the policy, and elected to defend the suit which resulted in a judgment for over $6,000.00. It refused to appeal, but offered to satisfy the judgment, wherein insured appealed and secured a reversal. It was held that the insurer had a duty to appeal and, having failed in its duty, was liable in excess of its policy limit to the extent of expenses of appeal.

The following three cases may be grouped as substantiation of the rule in some states that the violation of an agreement to appeal subjects the insurer to certain liability beyond its coverage, particularly where the insured relied upon the agreement to appeal. If the insured can prove that an appeal would have been effective in reducing or reversing the judgment, he could maintain a cause of action against his insurer and thereby recover damages equal to the amount of the judgment in excess of the coverage.

Getchell and Martin Lumber and Manufacturing Company vs. Employers Liability Assurance Corporation, 117 Ia. 180, 90 N. W. 616. In this case an action was brought to recover damages because an insurer, whose policy limit was $1500.00, agreed to, but failed to appeal from a judgment of $4,737.00. The court held that the terms of the policy probably did not create a duty of the insurer to appeal, but that the agreement of the insurer, after judgment was rendered, to appeal presented the question as to recovery beyond the amount of the policy limit. The court held that the insured must prove that the appeal would have been effective to reverse the original judgment. The following language was used:

> "We may assume, for the purpose of this case, that defendant is liable for any default or neglect of the attorney it employed, and we then have this question: What damages have been shown? The case is a singular one in many of its features. Our attention has been called to none just like it in the books. Plaintiff lays such stress upon the fact that defendant was an in-

surance company, and some of the arguments made seem to embody the thought that it guaranteed a hearing in this court, but this is not so. Insofar as the appeal was concerned, it had the responsibility only that would have attached to any other agent undertaking a like duty. . .

". . . . . In our opinion, the burden is upon a plaintiff in an action of this nature to show the amount of his damages."

See also the case of *Wynnewood Lumber Company vs. Travelers Insurance Company, 173 N. C. 269.*

The case of *Sterios vs. Southern Surety Company, 122 Wash. 36, 209 Pac. 1107,* was an action wherein the insured after paying a judgment for $12,000.00, attempted under an insurance policy having a policy limit of $5,000.00, to recover the amount of the coverage and also the difference between the amount of the judgment and the coverage. The insurer after expressing the opinion that reversible error existed, promised to appeal, but failed to do so. The court held:

"That an indemnity insurer after the recovery of a judgment for personal injuries against insured for more than the amount of its own liability promised to appeal from the judgment, and subsequently failed to do so, does not, as matter of law, establish damages to insured, or estop or preclude the insurer from asserting or claiming the contrary, and there can be no recovery for such breach of promise in the absence of proof of damage."

In the case of *McAleenan vs. Massachusetts Bonding and Insurance Company, 232 N. Y. 199,* an insured sought to recover from his insurer an amount which he was compelled to pay in satisfaction of a $13,000.00 judgment. The defendant insurer had contributed the amount of its coverage of $5,000.00. The insurer had originally defended the action and after agreeing to appeal the same had failed to do so. The court held that the burden was upon the insured to show that the judgment above mentioned would have been reversed if the appeal had been taken. In affirming a judgment in favor of the plaintiff insured, said:

"Passing upon defendant's second proposition, we think that it was entitled to show if it could that no errors were committed upon the trial of the action against plaintiff and that, therefore, its appeal would have been useless. While as we have indicated, the burden rested upon plaintiff to establish as part of his case that there were errors, rather than upon defendant to show that there were no errors, nevertheless the plaintiff having offered some evidence as we must assume for the purposes of this appeal that he was injured by the failure to take the appeal, it was proper that defendant should be permitted to rebut this evidence if it could. It sought to do this by offering in evidence the record of the trial in the negligence action and this offer was overruled with proper exception for the defendant. . . . . It must also appear that the error was prejudicial and in this case, where the proffered evidence is open to our inspection, appellant holds the burden of making it appear that the record would have disclosed the absence of any error for which the judgment could have been reversed and that thus it was prejudiced by the rejection. We do not think that it has sustained this burden and that the record which it offered enables us to say that no reason was disclosed for which the Appellate Division might have granted a new trial. . . . . .

". . . . . Of course it is not desirable to review at length the evidence upon that trial for the purpose of showing that considerations would have been presented which would fairly have justified such action by the Appellate Division. It may be stated briefly that plaintiff's case rested almost entirely upon the evidence of one witness which not only was not very impressive itself but which was contradicted both by the defendant's witnesses and also in material respects by a witness sworn by the plaintiff."

The above cases indicate that an insurer has the duty to appeal and that the failure to exercise the duty to appeal can give rise to liability beyond the limit of the policy. The duty herein mentioned arises by reason of agreement to appeal.

CONCLUSION

In conclusion it may be said that where a judgment results in excess of the policy limit, the insurer has the right to appeal, such right arising from the policy provisions giving the insurer the right to defend. The right to

appeal is qualified only by the rules relating to bad faith and negligence. The exercise of the right of appeal, free of bad faith and negligence, does not subject the insurer to additional liability in excess of the policy limit and this is true regardless of the objection of the insured to the appeal or a request by the insured for payment of the judgment to the extent of the policy limit.

The duty to appeal where the judgment results in excess of the policy limit exists only in certain jurisdictions and the violation of that duty may subject the insurer to additional liability to the extent of attorney's fees and the costs of appeal incurred by the insured on appealing. In other jurisdictions it is the rule that the duty to defend does not include the duty to appeal, and that an insurer may pay the policy limit and abandon the case without further liability of any kind. Where, however, an insurer agrees to appeal and then fails to do so the insured may bring an action for the excess above the policy limit upon showing that an appeal would have been effective to modify or reverse the judgment. The burden of proof in such a case rests upon the insured.

To prevent the claim of an agreement to appeal that would come under the last conclusion above stated, an insurer in the event of a decision to pay the policy limit and abandon the case, should give ample written notice to the insured of its intention.

Respectfully submitted,

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Report of Committee On Life Insurance

YOUR Committee directs the attention of the Association to a recent legislative enactment which has been the source of considerable discussion at the Home Offices of many insurance companies and merits the consideration of members of the Association.

The Legislature of the state of Michigan in 1939 amended its divorce law, a part of which is as follows:

"Hereafter every decree of divorce shall determine all rights of the wife in and to the proceeds of any policy or contract of life insurance, endowment or annuity upon the life of the husband in which she was named or designated as beneficiary, or to which she became entitled by assignment or change of beneficiary during the marriage or in anticipation thereof, whether such contract or policy was heretofore or shall hereafter be written or become effective and unless otherwise ordered in said decree, said policy or contract shall thereupon become and be payable to the estate of the husband or to such named beneficiary as he shall affirmatively designate: provided, that the company issuing such policy or contract shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless before such payment the company shall have written notice, by or on behalf of the insured or the estate of the insured or one of the heirs of the insured, or any other person having an interest in such policy or contract of a claim thereunder and the aforesaid divorce."

No appellate court has passed upon the foregoing law, and the only comment available appears in the April, 1940, issue of the Michigan State Bar Journal (page 171) which states:

"Act No. 220, Section 12766 C. L. '29 (25.131 M. S. A.), makes it mandatory that divorce decrees hereafter granted dispose of not only the dower of the wife in the husband's real estate, but also her interest in any life insurance, endowment or annuity upon her husband's life. Many expensive interpleader actions have been necessitated by divorce and subsequent remarriage of a man who, throughout the entire period of his marital experiences, owned a life insurance policy payable to 'my wife'. There are many variations in the theme, but insurance companies have never felt justified in paying on such policies whether the first wife were named in the policy or not, without an interpleader action, and the result has been that small

policies have been quite thoroughly eaten up in legal fees at the expense of the beneficiary. Under the provisions of Act No. 220, unless other provision is made in said decree, such policies are automatically payable to the estate of the husband or to such other named beneficiary as he may affirmatively designate. The insurance company is, however, authorized to pay in accordance with the terms of the policy unless, before such payment it shall have written notice on behalf of the insured, or his estate, or one of his heirs or any other person having an interest in the policy, of the fact of such divorce. It would accordingly seem desirable to not only incorporate definite disposition of insurance interests in the decree of divorce but to see that the insurance company in each instance is given prompt notice of the disposition made."

A discussion of the effect of divorce on old line life insurance appears in *Couch on Insurance,* Volume 2, pages 1270-1272, par. 440h, in which it is said:

"* * * the general rule is that the right of the wife, as beneficiary, to the proceeds of a policy upon the life of her husband, issued prior to divorce of the parties, is not subject to the objection that the divorce terminated her insurable interest, under the rule prevailing in most jurisdictions that a life policy, originally valid, does not cease to be so by the cessation of the assured's interest in the life insured; in other words, that a subsequent divorce does not devest a wife's insurable interest so far as prior insurance is concerned, even though she remarries, unless such be the necessary effect of the provisions of the policy itself. This means that, in the absence of terms in the policy indicating that the rights of the beneficiary thereunder are conditioned upon continuance of the marriage relation then existing between the beneficiary and the insured, or regulation of the matter by statute, the general rule is that the rights of the beneficiary in an ordinary life insurance policy, including the right to receive the proceeds thereof upon maturity of the policy, are in no way affected by the mere fact that the parties are divorced subsequent to the issuance of the policy, especially if no attempt is made to change the beneficiary after the divorce, and the insured continues to keep up the payments on the policy, or where the decree was in her favor."

In *Cooley's Briefs on Insurance* (2d Ed.) vol. 7, page 6358, it is stated:

"In the absence of statute or regulation of the insurer to the contrary, a decree of divorce in itself in no way affects the rights of the divorced wife in a policy of insurance on her husband's life or her authority to demand and receive the amount payable in virtue of its terms."

And see, also, the notes in L. R. A. (N. S.) where the following cases are reported: *Wallace v. Mut. Ben. L. Ins. Co.,* 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S.) 478, and *Green v. Green,* 147 Ky. 608, 144 S. W. 1073, 39 L. R. A. (N. S.) 370, Ann. Cas. 1913D, 683.

Texas and the Province of Quebec appear to be the only jurisdictions where, without specific statutory provision, supervening divorce will terminate the right of a wife as beneficiary.

Respectfully submitted,
PAUL J. MCGOUGH, *Chairman*
JAMES A. DIXON
ANDREW D. CHRISTIAN
JAMES N. FRAZER
W. CALVIN WELLS, III
HOBART H. GROOMS
OLIVER R. BECKWITH, *Ex-Officio*

Report of Committee on Health & Accident Insurance Law

THE Committee on Health & Accident Insurance Law reports as follows:

Shortly after the appointment of the Committee on Health & Accident Insurance Law the members of the Health & Accident Insurance Law Committee of the American Bar Association agreed to undertake the work of annotating a form of health and accident insurance policy, somewhat along the line of annotations of the automobile liability policy and the fire insurance policy, heretofore prepared by committees of Insurance Sections of the American Bar Association.

As certain members of the Health & Accident Insurance Committee of the International Association of Insurance Counsel, including your Chairman, are also members of the Health & Accident Insurance Law Committee of the American Bar Association, and as the task undertaken by the Committee of the American Bar Association involves a tremendous amount of labor, it was felt that this Committee of the International Association of Insurance Counsel should not attempt anything further at this time.

Respectfully submitted,

JEWEL ALEXANDER, CHAIRMAN
WILSON C. JAINSEN
ROERT P. HOBSON
STEVENS T. MASON
JAMES S. BUSSY
BURRELL WRIGHT
MILLER MANIER
JAMES E. NUGENT

Report of Committee on Compulsory Automobile Insurance and Financial Responsibility Legislation

THIS Committee in previous years has expressed the view that the Financial Responsibility Statutes as then enacted in the various states were inadequate to effectively cope with the problem of the uncompensated accident victim.

However, with the subsequent enactment of the Financial Responsibility laws by the states of New Hampshire and New York, which laws have been studied by this committee, we have reason to believe that laws of this type will more nearly meet the problem.

We therefore recommend to the Association:

(1) That the members of this Association observe the operation and experience of these laws so that amendments may be suggested and recommended as such experience shows to be necessary after a fair period of observation.

(2) We feel that the present name of this Committee is a misnomer. We therefore recommend that the name of the said committee be changed to—"THE COMMITTEE ON HIGHWAY SAFETY AND FINANCIAL RESPONSIBILITY LEGISLATION," or such other appropriate name as the Executive Committee may select.

(3) That the Committee be continued or a new committee be appointed for the primary purpose of observing the operation and experience of the New York and New Hampshire Financial Responsibility Laws.

Respectfully submitted,

JOHN L. BARTON, *Chairman*
RICHARD H. FIELD
L. J. CAREY
WILLIAM H. FREEMAN
FRANCIS M. HOLT
HERBERT W. J. HARGRAVE
ALLEN E. BROSMITH
LOWELL WHITE
WILLIS SMITH

Litigation Under the Provisions of the Soldiers' and Sailors' Civil Relief Act of 1940

By JOHN B. MARTIN
Philadelphia, Pennsylvania

ON OCTOBER 7, 1940, Public Act No. 861, 76th Congress, known as the Soldiers' & Sailors' Civil Relief Act of 1940[1] was approved. The Act provides for relief of persons in the military service from particular obligations such as rent contracts, installment contracts, mortgages, life insurance contracts and tax liabilities. The Act further provides that actions by or against those in military service may be stayed or continued. It is also provided that Statutes of Limitations are extended for the bringing of any action by or against a person in the military service.

Section 604 of the Act provides that it shall remain in force until May 15, 1945, and at that time if the United States is engaged in war, the Act shall remain in force until six months after such war is terminated by a treaty of peace proclaimed by the President of the United States.

A large proportion of our population is now in the military service and if we should enter the war in an active manner the proportion will increase. Many of these persons, either before they enter the service or during their service, will be involved in accidents. It is the purpose of this article to consider those provisions of the Act affecting litigation in which Insurance Companies are involved. The life insurance provisions will not be considered for these provisions will be the subject of a paper to be presented at the Annual Meeting of the American Bar Association at Indianapolis, Indiana.[2]

II SOME GENERAL PROBLEMS OF THE SOLDIERS' & SAILORS CIVIL RELIEF ACT OF 1940 AFFECTING INSURANCE COMPANIES.

It is safe to predict that the Act will be held constitutional. As early as 1794, South Carolina passed legislation designed to protect soldiers from litigation. In 1802, the Congress of the United States passed an act with the same purpose—2 Stat. 136. Several such acts were passed during the Civil War. During World War No. 1, the Soldiers' & Sailors' Relief Act of 1918 (40 Stat. 440) was passed. This last act contained almost identical provisions as the 1940 act. The decisions interpreting the former should be helpful in applying the new Act. The Act of 1918 was held constitutional.[3]

The Soldiers' & Sailors' Civil Relief Act was passed under the War Power of Congress. When prior Acts were passed, this country was at war. This difference between the Act of 1940 and the former acts will probably not affect the right of Congress to pass such a measure. Under Art. 1, Sec. 8, Clauses 12 and 13, Congress is empowered to raise and support armies and to provide and maintain a navy. Under Clause 18, Congress is given authority to do everything necessary and proper to carry out the foregoing powers.

The Selective Training & Service Act of 1940—Sept. 16, 1940, 54. Stat. 971—has been held constitutional.[4]

If the Selective Training and Service Act is a proper exercise of the war power, no doubt the Soldiers' & Sailors' Civil Relief Act is a proper exercise of that power.

Many provisions of the Soldiers' & Sailors' Civil Relief Act of 1940 refer to an action "in any Court." Section 101 (4) provides that the term "Court" as used in the Act shall include any court of competent jurisdiction of the United States or any State, whether or not a court of record. Decisions interpreting a similar clause in the Act of Act of 1918 established that all state legisla-

[1]Act of Oct. 17, 1940. C888, 54 Stat. 1178–50 U. S. Code Annotated 510, 130 A. L. R. 794.

[2]Life Insurance features of the Soldiers' & Sailors' Civil Relief Act of 1940 by W. Colquitt Carter. *Round Table Life Insurance* September 30, 1941.

[3]Clark v. Mechanics American National Bank (1922, C. C. A. 8th) 282 F. 589; Hoffman v. Charlestown Five Cents Saving Bank (1918), 231 Mass. 324, 121 N. E. 15; Pierrard v. Hoch (1920) 97 Oregon 71, 191 Pac. 328.

[4]Stone v. Christensen, U. S. Dist. Ct. for District of Oregon, 36 F. Supp. 739, United States v. Rappeport, D. C. S. D. of N. Y., 36 F. Supp. 915, United States of America v. Albert Herling (and four other cases) United States Circuit Court of Appeals for the Second Circuit, June 2, 1941.

tion on the subject of soldiers' and sailors' relief is suspended. In the case of Pierrard v. Hoch (1920) 97 Ore. 71, 191 P. 328, the Court declared:

> "It is clear that under the war-making power the National Legislature has the authority to provide for the protection of its soldiers, to relieve them from anxiety and annoyance respecting litigation at home, and to make a general rule applicable alike to all those engaged in its service. In this instance it has occupied the whole field, which of necessity excludes all state legislation on the subject."

A similar result was reached in the case of Konkel v. State (1919), 168 Wisc. 335, 170 N. W. 715.

The benefits of the Act are extended to all members of the Army, Navy, Marine Corps, Coast Guard and officers of the Public Health Service detailed for duty with the Army or Navy. Such persons are entitled to relief under the Act while in military service. Military service is defined as active duty or training and education under the supervision of the United States preliminary to induction. It includes leaves of absence on account of sickness, furlough or other lawful cause. Military service terminates upon discharge from or death in the active service.

One of the few reported cases interpreting the 1940 Act is Lang v. Lang, 1941, 25 N. Y. S. 2d 775. The Court in that case declared that a retired officer, although selected for mobilization, was not in active duty and hence not entitled to benefits under the Act.

III. THE EFFECT OF THE SOLDIERS' & SAILORS' CIVIL RELIEF ACT OF 1940 ON THE STATUTE OF LIMITATIONS.

It is interesting to note that the Selective Training and Service Act of 1940, 54 Stat. 971, Sept. 16, 1940, Sec. 313, reinstated the Soldiers' & Sailors' Civil Relief Act of 1918 for the benefit of those inducted under the Act. Likewise, Section 404 of the Army Reserve and Retired Personnel Service Law of 1940, Aug. 27, 1940, 50 U. S. C. A. Sec. 401, also provides that the Soldiers' & Sailors' Civil Relief Act of 1918 shall be reinstated for the benefit of members of the National Guard ordered into active service. The above provisions were made non-applicable after the passage of the Soldiers' & Sailors' Civil Act of 1940 (Sec. 505).

Therefore, the Statute of Limitations may be affected by Selective Training and Service Act of 1940, Army Reserve and Retired Personnel Service laws, and the Soldiers' and Sailors' Civil Relief Act of 1940. For those entitled to benefits under the Selective Training and Service Act of 1940, the date of September 16, 1940, would apply; for those entitled to benefits under the Army Reserve and Retired Personnel Service Law, August 27th; and for those entitled to benefits under the Soldiers' & Sailors' Civil Relief Act of 1940, October 17, 1940.

Section 205 of the Soldiers' & Sailors' Civil Relief Act of 1940 provides:

> "The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

This provision is the same as the provision used in the 1918 Act. Although Statutes of Limitations are not mentioned, they are controlled by the Act. Other statutory periods during which actions may be instituted are also tolled.

In the case of Bell v. Baker (1924) Texas 260 S. W. 158, plaintiff, on February 9, 1917, was accidentally injured. At that time the plaintiff was in the Army where he remained until December 23, 1918. The defendant railroad was taken under Federal control January 1, 1918. It remained under Federal control until March 1, 1920. The plaintiff instituted this suit against the receiver of the railroad on January 19, 1921. The statute of limitations for this action was two years, but both the Soldiers' & Sailors' Civil Relief Act of 1918 and the Transportation Act contained provisions staying the running of the Statute of Limitations. The Court held that these provisions of both Acts were constitutional and applicable, hence that the plaintiff had brought his action within the period. A similar result was reached in the case of Kosel v. First National Bank of Ashley (1927), 55 N. D. 445, 214 N. W. 249.

In the case of Halle v. Cavenaugh (1920), 79 N. H. 418, 111 A. 76, a married woman instituted an action to recover for personal

injuries. Prior to her trial she died and her husband was named as her executor; shortly thereafter he was inducted into the military service. After his discharge he, as executor, endeavored to proceed with the action which his wife had instituted. Under New Hampshire law, an executor is required to assume the prosecution of a suit begun by his testator or testatrix within two terms of Court, if at all. It was held that the act of an executor in assuming the prosecution of a suit instituted by his testatrix was not "the bringing of an action" within the meaning of the Act of 1918. However, the Court held under existing law, the executor not having prosecuted the action, the husband of the plaintiff was entitled to sue in his own right. In other words, as to his individual right of action, the limitation period was tolled.

In the case of Sternfeld v. Massachusetts Bonding & Insurance Company (1921), 80 N. H. 39, 112 A. 800, it was held that under the 1918 Act, the period of military service was not to be included in computing a 90 day period provided in a policy of indemnity insurance for bringing suit. The Court reasoned:

> "The application of the Federal Act is not limited to statutory provisions. It applies to all law; and provides in substance, that notwithstanding the state law limits the actions as by contract agreed, that law shall not apply while the plaintiff is in the service. . . . It was not the legislative intent that the remedial purpose of the act should be defeated by a narrow or technical construction of the language used."

A similar result was reached in the case of Green v. Bankers Life Insurance Co. (1922) 112 Kan. 50, 209 P. 670.

Many of the provisions of the 1940 Act are discretionary; however, the above quoted Section 205 is mandatory. It is interesting to note that the relief afforded persons in the military service also should be applied to his heirs, executors, administrators or assigns.

It will be necessary for insurance companies to keep open many files that would ordinarily be closed at the end of the statutory period. Certainly files created after October 17, 1940, should not be destroyed for the duration of the emergency, if there is any possibility that a claimant will be inducted in the service.

IV. THE EFFECT OF THE STAY PROVISIONS OF THE SOLDIERS' & SAILORS' CIVIL RELIEF ACT OF 1940 ON INSURANCE LITIGATION.

Section 201 of the 1940 Act provides that at any stage, any action or proceeding in which a person in military service is involved as plaintiff or defendant, during the period of such service or 60 days thereafter may, in the discretion of the Court in which it is pending, on its own motion, or shall on motion by such person or some person on his behalf, be stayed unless, in the opinion of the Court, the ability of the person in military service to prosecute or defend the action is not materially affected by reason of his military service.

Section 101 (3) of the 1940 Act provides that, in the discretion of the Court, a stay may be granted to sureties, guarantors, endorsers and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed or suspended.

Section 204 provides that where the person in military service is a codefendant with others the plaintiff may nevertheless by leave of court proceed against the others.

Section 602 of the Act provides that any interlocutory order made by any Court under the provisions of this Act may be revoked, modified or extended.

It is easy to see that the courts are given discretionary powers in granting or refusing to grant stays. The action of the trial court in granting or refusing to grant a stay is subject to review on appeal, and if an abuse of discretion is shown, appropriate relief may be obtained.

In the case of Fennell v. Frisch (1921), 192 Ky. 535, 234 S. W. 198, the appellate court affirmed an order refusing a continuance in a negligence case where defendant was a captain in the Ordnance Department, whose official duties allowed him to spend considerable time at his home The continuance was asked for after the Armistice was signed. The Court declared:

> "It was the evident purpose of Congress to make it discretionary with the trial Judge whether, under the facts of a particular case, a stay of proceedings should be had. Unless, therefore, the lower Court abused its discretion, no relief can be afforded defendant. Had defendant been away from home in the military or naval service, and because of this fact, unable to

assist in the preparation of his case, or to consult with his counsel, or to be present in person at the trial, we would have a case different from that presented by the present record, and one the like of which called for protection of a moratorium such as provided by Congress."

In the case of Vaughn v. Charpiot (Tex. Civ. App. 1919) 213 S. W. 950, a trial took place while plaintiff in error was in military service. An application for a continuance was overruled by the trial Court. It was held that inasmuch as the plaintiff in error was in military service and a most material witness, the lower Court erred in not granting a continuance.[8]

It is fair to predict that actions will not be stayed in some cases while we are only in an emergency situation. Once we enter into active hostilities, actual war psychology will produce more liberality in granting stays.

Two decisions under the 1918 Act will no doubt be much cited in dealing with the exercise of discretion by courts as to parties other than those in the military service.

In the case of White v. Kimerer (1921), 83 Okla. 9, 200 Pac. 430, the plaintiffs sued against one Jones and his employers for damages resulting from alleged negligence of Jones and others in causing the death of their son. At the time of the trial the action was dismissed as to Jones who was then in the military service. The action proceeded against the other defendants and the plaintiffs recovered a verdict of $4,000. The appellate court declared that the lower Court had not abused its discretion in refusing a continuance.

A different conclusion was reached in the case of Ilderton v. Charleston Consolidated Ry. & Lighting Company (1919), 113 S. C. 91, 101 S. E. 282. The action was for damages as a result of personal injuries to the plaintiff caused by defendant's trolley car, operated by O'Quinn as motorman. At the time of the trial and prior thereto, O'Quinn was in the military service. The defendant endeavored to obtain O'Quinn's depositions but was not successful. A continuation was refused and plaintiff recovered a verdict of $5,000. The defendant appealed on the ground that this trial Court erred in refusing defendant's motion for a continuance. The appellate Court reversed[9] the lower Court and declared:

"We come now to view this case from the standpoint of the rights of the absent witness O'Quinn, who, though not a party on the record, was deeply interested in the event of the action; for, as his liability to plaintiff was predicated solely upon his conduct, his liability over to defendant will be affected by the Judgment . . ."

"It follows that his honor was in error in thinking that the Judgment in this case would have no effect whatsoever on the rights of O'Quinn. And from this it appears that, in exercising his discretion, he was influenced by error of law."

No one knows the extent to which litigation will be affected by this stay problem. The Act may remain in force many years. The number of persons in military service may be greatly increased.

Insurance Companies defending negligence suits for assureds may be faced with a large number of continued old cases carrying a high statutory reserve. Periodical investigation check-ups will be desirable in these cases. They are also faced with the prospect of trying many cases without the presence of the defendant. Will some of the courts say that a defendant who is adequately insured is not materially affected in the trial of a case by reason of his military service? Will the Court grant stays or continuances to employers in cases where their agents who, are material witnesses, are in the military service? The cases interpreting the 1918 Act are helpful but it must be remembered that today there are more insured vehicles than in 1918. There are more automobile drivers than in 1918.

The following suggestions or ideas might warrant consideration by attorneys defending insurance company cases.

1. The defendant who is in the military service should be asked to procure an attorney to represent him personally, when a stay question is involved. This attorney could advantageously point out, depending of course on the facts, that:

(a) The ad damnum is above the coverage limit, indicating that his client may be materially affected by a trial in his absence.

(b) His client has a right of action against

[8]A similar result was reached in Hoffman v. Charlestown Five Cents Saving Bank (1918), 231 Mass. 324, 121 N. E. 15.

[9]Two of the five Judges dissented.

plaintiff or his privies or such right of action may be prejudiced by a trial at which his client is not present.

(c) While his client is insured in an excellent company, if the case should be a long drawn out affair, the Company may become insolvent before a judgment rendered against his client is paid.

(d) He has been unable to consult with his client.

2. As soon as it is learned that a defendant-insured is in the military service, a stay should be requested. Often a timely request is more receptive to a court than a request for a continuance on the morning of the trial. The petition or motion for a stay should set forth facts showing that the defendant is in the military service, together with facts concerning his duties; that the defendant has a good defense to the action; that he cannot be present; and that he will be prejudiced and materially affected by his non-appearance. If the request for a stay is refused, then the defendant's attorney should do what he can to take depositions. Then, if they are not procured, a later motion for a continuance ought to be favorably received. During arguments on these motions, it is not unlikely that many settlements will be made.

3. Where a question of policy coverage is involved with an insured who may be inducted, the insurance company should seek relief by way of Declaratory Judgment. This is usually a speedy remedy.

4. If it is possible, in any suit, that a person in military service, is liable over to an assured, that fact should be brought to the Court's attention, if a continuance is deemed advisable.

5. Where one co-defendant is in the service, the possibility of an application of the principles of contribution among tort feasors should be presented to the Court, in a stay proceeding.

6. In those cases where defendants or important witnesses may be inducted, the insurance companies might now ask for trial preference. Perhaps the Courts will cooperate and many cases will be disposed of. If the Courts should not grant trial preference in such cases, they should grant continuances if the cases come up at a later date when defendants or witnesses are in the military service.

May an Insurance Company Rely on the Allegations of a Complaint Against One of Its Insurers in Deciding Whether the Case is One Within the Terms of the Policy?

By Lasher B. Gallagher,
Los Angeles, California

AT THE outset it must be obvious that it is practically impossible to discuss in a comprehensive manner all of the specific problems which not only can but will arise within the scope of the question which has been assigned to me. I have attempted to make this paper as brief as will permit a general analysis of those questions of coverage readily suggested by a perusal of the contracts of insurance which are usually involved in the disputed matters submitted to the lawyer engaged in what we call the general insurance practice.

Although various names are assigned by the companies to the policies, all of them contain two basic obligations on the part of the insurer: First and foremost is the agreement on the part of the company to pay on behalf of the assured all sums which the assured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident, and arising out of the particular risk insured against; and to pay on behalf of the assured all sums which the assured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the particular risk insured against. Second is the agreement on the part of the company that as respects insurance afforded by the policy the company shall defend in his name and behalf any suit against the assured alleging

such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

It is a general principal of the common law that whenever one person has agreed to indemnify another against loss or liability, such contract carries the obligation to defend or pay the costs of defense in the event suit is brought against the indemnitee because of a claim which is within the fair construction of the risk described in the contract but there is no obligation to defend or pay the costs of defense unless there is also the duty to pay a judgment either before or after it is satisfied in the event one is rendered against the indemnitee. Of course, the obligation to pay the costs of defense under common law principles of indemnity exists in the event the indemnitee successfully defends an action which if lost would have resulted in the legal duty to reimburse the indemnitee for the loss incurred or the satisfaction of a judgment if the contract provides for indemnity against liability.

Most of the current insurance contracts provide for indemnity against liability rather than against loss and the companies have voluntarily expanded their obligations to defend and pay the costs thereof. Instead of the duty to defend following the requirement to indemnify against the liability specified in the policy, the insurer is faced with the legal obligation to defend in many cases where there is no duty to pay a judgment if one is rendered against the assured.

Although the examples will be restricted in this paper it is apparent that the general principle is applicable to every insurance contract which contains an agreement to defend the insured in any action wherein the complaint alleges the happening of an event which is within the general insuring clause.

The preliminary investigation conducted by all well managed claims departments usually includes a thorough check of the place, object or instrumentality wherein or whereby the alleged liability accrued. Whenever these matters coincide with the insuring clause and the declarations there is no difficulty in determining that the assured is entitled to a defense. Where they do not coincide the separable obligation to defend is often imposed upon the company because the duty to defend does not depend upon the right to be indemnified against the liability which may actually exist.

It is necessary in many instances to critically analyze the complaint which has been filed against the assured to weed out irrelevant and redundant matter in determining whether the assured is entitled to a defense. Descriptive matter inserted in a complaint may tend to lead us astray if we allow it to obscure our view of the actual facts of which we have knowledge because of the reliable information contained in the file.

Examples serving to illustrate the danger of determining whether or not to defend by sole reference to the allegations of the complaint are the following:

1. *Standard Automobile Policy.*

The automobile described in the contract is a 1939 Buick Convertible Coupe. The assured reports an accident and the investigation conducted by the claims department conclusively shows that the assured was involved in an accident in one county of a state very close to the boundary line of another county and the date of the event. It is also ascertained that personal injury and damage to property has occurred. Although there is a dispute as to the manner in which the accident occurred, let us assume that there is a question of fact which must be submitted to a jury. There is thus presented a possible tort liability. A careless lawyer is retained by the injured person and suit is filed without adequate knowledge of the details. The complaint alleges that in a county other than the correct one and on a date different than the time of the accident the assured so negligently operated a certain Ford sedan automobile upon a public highway of the particular state that the same was caused to and did collide with an automobile then and there being driven by the plaintiff, thereby causing the plaintiff to be thrown out of his automobile with resulting bodily injuries, et cetera. It may be that the suit is groundless in that the great preponderance of the available evidence points to a conclusion that the assured was not negligent at the time of the happening of the only accident in which he was actually involved but it is not false or fraudulent in the sense that the assured was not involved in any accident at any time or place.

In order to make out a case against the assured under our modern procedure there is no necessity to prove that the accident happened upon the exact date or in the exact place specified in the complaint or that an auomobile of a paricular make was involved. It is only necessary to allege ultimate facts

justifying the conclusion that there was actionable negligence on the part of the person charged with responsibility for the damage caused thereby. If, in the complaint referred to, we ignore the errors with reference to county, date and the trade name of the automobile, there is no question about the fact that the complaint alleges facts which bring the case within the language of the policy. Weeding out the evidentiary matter the complaint would allege as follows: The assured so negligently operated an automobile upon a public highway of the particular state that the same was caused to and did collide with an automobile then and there being driven by the plaintiff, thereby causing the plaintiff to be thrown out of his automobile with resulting bodily injuries, et cetera.

This method of analysis of the complaint will bring the obligation to defend and to indemnify against liability squarely within the provisions of the policy. We must keep in mind that the language of the contract does not say that the company will defend or indemnify against liability if the particular automobile described in the policy by name and model is specifically described in the same manner in the complaint in any action which may be commenced against the assured. It seems clear to me that whenever the assured incurs a liability which is imposed upon him by law for damages caused by accident and arising out of the ownership, maintenance or use of the particular automobile which is named and described in the policy or the said automobile is involved in an accident which results in suit being filed against the assured for damages, there is an obligation on the part of the company to provide a defense notwithstanding the fact that the complaint may state that the automobile involved in the accident was of an entirely different make or model.

If, in the assumed case, the assured had actually been operating a Ford Sedan Automobile at the time of the accident and it was not within the provisions of the contract with reference to automatic insurance for newly acquired automobiles then there would be no obligation to defend or indemnify. In such case the refusal to defend would not be based upon the allegations of the complaint but upon the fact that the particular automobile being operated by the assured was one, the use of which imposed no obligation of any kind upon the company. The actual fact of identity of the particular automobile, the ownership, maintenance or use of which imposes a liability upon the assured, is the determining factor, rather than the description thereof in a complaint.

If a complaint alleges in general terms that the assured was guilty of actionable negligence in the operation of his automobile because he was towing a trailer without proper braking equipment, I doubt very much whether the company could rely upon the allegations of the plaintiff's pleading in deciding whether to provide a defense. Assume that the assured was actually operating the automobile described in the policy and that he was involved in a three-car accident, one of which was towing a trailer but that it was not the assured's automobile. Assume that the injured party gets the identities of the drivers of two of the vehicles transposed and actually believes and alleges that the assured was the person whose car was towing the trailer. When the facts are disclosed during trial or by deposition before trial there is no doubt about the proposition that any court would permit an amendment of the complaint to correct the mistake. If the insurer were to deny liability relying exclusively upon the allegations of the complaint it would have a violent awakening when upon being sued the judgment roll with the amended complaint as a part thereof is introduced in evidence in support of the claim that the action was one covered by the defense and indemnity provisions of the policy.

2. O. L. & T. Public Liability Policy

The premises described in the policy consist of an office building located at the corner of Sixth and Market Streets in the City of San Francisco. The owner of the building is a corporation which has no real property excepting the particular building referred to. An invitee of one of the tenants is riding in an elevator, the location of which is contained in the policy. As a result of actionable negligence in the maintenance or operation of the elevator, the invitee is injured and the accident is promptly reported. The investigation conducted by the insurance company shows that the damage suffered by the invitee is within the coverage of the policy. A complaint is filed against the insured because the case cannot be amicably settled. The pleading alleges that the corporation, by and through its servants, so negligently maintained and operated a certain elevator in a building owned by the corporation that the same was caused to fall rapidly down the shaft and

violently collide with the bottom thereof causing bodily injury to the plaintiff who at all times mentioned was lawfully riding thereon as an invitee of the defendant. The complaint erroneously describes the location of the building and states that it is located at the corner of Sixth and Mission Streets.

It is quite obvious that if the accident did in fact occur in a building located at the corner of Sixth and Mission Streets there would not be the slightest obligation on the part of the company to defend or indemnify but it is equally clear that the misdescription of the location in the complaint is of no importance. The liability of the assured to the person injured does not depend upon the location of the tort. While it is true that a liability for damages on the part of the assured does not always mean that the insurer is also liable, it is a fact that whenever the liability of the insured accrues within the premises or places described in the policy, the company is likewise bound. In order to state a cause of action in most states and in the federal courts under the new rules of civil procedure, I do not believe it is necessary for the injured party to allege the street address of the building where the accident happened. All that would be necessary would be to state facts showing that the building where the accident occurred was owned or controlled by the assured. Any descriptive matter such as the number of floors or the street address would be surplusage and any allegation which is not an ultimate and material fact required in order to state a cause of action must be ignored by the insurance carrier in determining whether the liability of the assured is one within the provisions of the policy.

CONCLUSION

In preparing this paper I have purposely avoided the citation of decisions for the reason that to do so would of necessity burden the members of the association and our guests with a maze of conflicting matter. In addition to this fact, it is useless to rely on any decision as authority for any point involving the construction of an insurance policy unless the contract involved in the litigated case is the same as that of the policy submitted to counsel for an opinion. I have selected some cases which may be of interest and the citations are attached as an appendix to this paper.

It seems to me that no insurance carrier may safely rely upon the allegations of a complaint in determining whether or not a duty to defend or indemnify exists. The decision must in all cases be based upon the actual facts pursuant to which the liability of the assured arises. If we keep in mind the ultimate and material facts alleged in a complaint, ignore all else, and compare those matters with the facts surrounding the tort, much useless and expensive litigation will be avoided.

APPENDIX

Bloom-Rosenblum-Kline Co. v. Union Indemnity Co., 167 N. E. 884.

Brodek v. Indemnity Ins. Co. of North America, 11 N. E. (2d) 228.

Fessenden School, In. v. American Mutual Liability Ins. Co. 193 N. E. 558.

Grand Union Company v. General Accident Fire and Life Assur. Corp., Ltd., 4 N. Y. S. (2d) 704.

Greer-Robbins Co. v. Pacific Surety Co., 37 Cal. App. 540.

Kramarczyk v. Wolverine Ins. Co., 275 N. W. 822.

London Guarantee & Acc. v. Shafer, 32 Fed. Supp. 95.

Massachusetts Bonding and Ins. Co. v. Roessler, 112 S. W. (2d) 275.

Montgomery v. Utility Ins. Co., 117 S. W. (2d) 486.

United States Fidelity and Guarantee Co. v. Cook, 179 So. 55.

United States Fidelity and Guarantee Co. v. Cook, 192 So. 24.

The Casualty Home Office Looks to Local Counsel for Better Public Relations

By Victor C. Gorton
Chicago, Ill.

PUBLIC relations suggest the word "advertise" which to me means public announcement, either by word or deed, of the advantages and usefulness of a product or a service.

Action by the business man in accord with what the public expects from him, and his calling that manner of action to the attention of the public, is advertisement of the highest order. Business men are today convinced that they must not only sell their products and services, but also that they must sell *themselves* to the public.

In this period of unnaturally stimulated business activity and of economic and political uncertainty, it is more than ever necessary that our business of insurance sell itself to the public and by the esteem and confidence thus established fortify itself against the more difficult times which many of us anticipate.

Any business, which in good faith attempts to give all it can to the public in return for the compensation received and which informs the public of the success attending its effort, will, perforce, establish the bulwark of good public relations.

The public relations of a particular business is revealed in the public's state of mind toward that business. This state of mind should be a favorable one and when once secured may be called "good will," which has been defined by a United States Supreme Court Justice as "the tendency of the customer to return to the place where he has been well treated." As applied to the business of insurance, "good will" may be defined as the inclination of the public to rely upon, and believe in, the disposition and ability of our companies equitably to perform their obligations.

We make our living out of the insurance business. In this, our success is dependent upon the success of the companies which employ us. The success of any one company, in turn, is in great measure dependent upon the position which the casualty insurance business occupies in the public esteem. When local counsel serves the public relations interest of his company, he is also serving his own interests.

Both for the company and for its local counsel, adherence to the profit motive is more than important, it is vital to their survival. This very strong motive itself furnishes a reason for the necessity of acquiring public good will, in that the profit motive can survive only by selling and servicing an *informed* and *satisfied* public. By informing and satisfying the public we make easier our job of handling claims and litigation.

The early failure of the companies to realize that the amount of their profits is intimately and proportionately related to the extent of the public's satisfaction with their services, has turned away many millions of potential premium dollars. Those of us who can look back along the trail of casualty claims for twenty-five years have seen the bad results, for all companies, of the substandard claim policies of some of them. During the early decades of liability insurance, too many companies followed a short-sighted policy of neglecting the claims of others against their policyholders. They not only failed to give full and fair consideration to such claims but often failed to give them any consideration at all, regardless of the obligation of the insured on the merits.

Such practices built public distrust and ill will; they encouraged exaggerated claims and unnecessary and costly damage suits. Today our work as company counsel would be easier, and company premium volume and profit would be higher, had our business given more real consideration to the public in those early days.

Those days of abruptness and discourtesy, of the "take-it-or-leave-it" attitude, are no more. We now realize that "high pressure" methods in negotiations and in the defense of litigation are unprofitable. It must now be conceded that most companies, in order to reach their present status in the public regard, have progressed a long way on the come-back trial. Yet the best of them still fail, occasionally, to render the kind of service that will give them the complete confidence

of the public. They have not yet fully learned how.

The good will accorded to a particular casualty company is not entirely determined by the quality of the service it alone affords. It is affected to a certain extent by the conduct of its competitors: If John Q. Public receives harsh treatment from one casualty insurer, he will damn the whole casualty field. His reaction will be the same as that of a man who breaks the first egg in a basket full, and finds it bad—he regards with suspicion all those remaining. Therefore, the job of earning the best possible reputation with the public is not a "one-company" job. Each of the many companies must recognize the value and necessity of public good will, and do more than pay "lip service" to it.

If a company's policy affords its insureds only that service *which the company itself* interprets as being the minimum it is legally obligated to render, then there is little reason why the policyholders or the public should accord to it good will. But if the company's policy allows its local counsel to give liberal interpretation of the service its contract obligates it to give, plus courteous and friendly rendition of that service, the insuring public will more than repay the company by way of increased business. If the insured is well satisfied because the attorney has gone the "other mile" with him, there is strong likelihood that the insured will become a public relations man for the company, and an unpaid one at that. Therefore, each company must examine its own practice to determine whether it is getting the maximum benefit out of every action that has potentiality for the development of good will.

Many casualty company officers now believe that insurance company claim practice —not only with regard to their own insureds, but also with regard to the third party claimants—must be founded upon and guided by the highest ethical standards of service. To accomplish this, the companies are turning with ever-increasing interest to local counsel —the men in the field who have numerous contacts with persons in all strata of society. These local counsel meet, talk to, and write to, policyholders, claimants, municipal and state officials, police, doctors, lawyers, merchants, chiefs and their relatives and friends.

Local counsel are often the most direct and real contact which a company has with its insureds—contact made at the important time when the policyholder is thinking: "Now I'll find out if this company is as good in its performance as it was in its promise. Is my policy just a scrap of paper, or is it a real symbol of protection in my time of need?" At this point, with reference to the many millions of reported claims annually, out of which many thousands of damage suits develop, the local counsel is called upon by his company to "deliver the goods." As a consequence, these men are afforded hundreds of thousands of direct opportunities favorably to impress others concerning the just and courteous attitude of their companies.

Since adverse position and the seed of disagreement are inherent in the nature of *liability* insurance, the local counsel who is doing a good job for the liability insurer is necessarily a good public relations man. His job is so saturated with public contacts that he must needs be a good public relations man to serve at all as local counsel.

But no matter how competent is local counsel, he cannot give his company client the benefit of a public relations policy when the company itself has failed to establish one. Like charity, public relations begin at home —for the casualty insurer, at its home office. Policies are formulated there and come out through the branch offices to the practicing attorneys in the field. All this implies that before a company can have good public relations it must itself think right and be right about its obligations to the public. It must make clear to its local counsel that it will perform promptly and will pay fully if it is fairly obligated under the circumstances; that it recognizes its policy creates obligations which must be thoroughly performed; that it will resolve actual doubt in favor of the insured; that it will not decline obligations where a policy breach has been innocent, immaterial, and has not prejudiced the company; that it recognizes the great majority of people are honest and that it will treat them as such, not allowing the comparatively few dishonest ones to sour its disposition; and that it will constantly maintain an attitude of cheerful willingness to keep its promises. If the company conscientiously adheres to such a code, its claim policy will be the most important tool in the hand of its public relations men—a specialty instrument to augment sales, growth, and ultimate profits.

But if the company has no policy or a policy inconsiderate of the public interest, then its local counsel is bound to share in some of its unenviable reputation, and his efforts will

be confronted with the prejudice which such reputation entails. The regard of the community for a particular company is illustrated by the story of the tourist who was involved in an automobile accident in a western town. In need of legal aid, he hustled up the street in search of the local attorney for his insurance company. When he met someone who looked like a native, he said:

"Pardon me, are you a resident of this town."

"Yes indeedy," was the reply, "been here something over forty year. What can I do for you?"

"I'm looking for the local counsel for the Skinnem Casualty Company. Have you got one here?"

"Well," reflectively answered the native, "we think we have, but we can't prove it on him."

The introspective attitude of which Robert Burns spoke, when he said: "O wad some power the giftie gie us to see ourselves as others see us" is essential to the local counsel who would compare his own attributes with those of the ideal company representative through whom good public relations are built.

What do we attorneys need to be in order to do our job as local counsel in a way that will further public relations?

We must be worthy and well qualified in our own personal right, that is: Be open minded—possess the ability to approach the matter in hand without prejudice, with intent to learn all the facts and to pay what is due.

Be absolutely honest in our interpretation of facts—honest in our reasoning and in our motivation.

Be intelligent, possess the native ability to recognize truth and the relationship of things to each other—to use our knowledge of cause and effect as a guide.

Be alert, in order that no important fact or circumstance escapes our attention.

Be imaginative, so that we may anticipate, upon the basis of our experience and upon that of others, what may take place in a particular case.

Be persevering, for, though our task be difficult, we cannot quit short of accomplishment. And, most important of all to the public relations aspect of our job, we must possess the power of those exceptional individuals concerning whom Chief Justice Story wrote:

"How few of all we meet possess the power
To smooth the rough or cheer the listless hour;
With modest air to temper manly sense,
Studious to please, and cautious of offense."

If we are "studious to please, and cautious of offense" we will be considerate, understanding, sympathetic: recognizing that while accidents, bodily injuries, death, and damage suits are just a part of the day's work to us, they are the unusual experiences of a life time, and matters of serious concern and much worry, to most people.

The local counsel must know exactly what are the legal obligations of his company client: how to carry out these obligations within the framework of safe practice; how to recognize and apply fully the *equitable* principles of company obligation, and how to keep both his company client and the persons with whom he deals, sold on his ability to serve them. If he has this knowledge and applies it *equitably* and in *good faith*, good will to the company is bound to follow in the wake of local counsel. Equity! Good Faith! If there are any words which are aptly indicative of our proper actions and attitudes in public relations, those are the words. Upon them may be predicated a code for the conduct of our business lives and enterprises. The man or company who acts in good faith, who does equity, will give to the party concerned all that he has contracted for, or is entitled to, and just a bit more in the way of courteous consideration. As a result that man or company will never lack friends or patrons.

Because good public relations are dependent upon mutual understanding, counsel must listen eagerly, alertly and open-mindedly, to learn what others think. Then he should speak, explain and instruct concerning the truth about our business. Since the layman does not know coverage, policy provisions and their interpretations, insurance law or claim technique, counsel explains such of these things as are necessary in every matter that he handles. A thorough, tactful explanation of what the company owes or does not owe, and why, will satisfy almost every person.

A prerequisite to good public relations is full understanding between local counsel and the company. When the attorney acts right and knows he acts right and the person with

whom he deals fails to understand, he should endeavor to explain away the misunderstanding, and failing in that, should so advise the company. Especially should the company be kept informed in those instances in which there is an apparent conflict between the interests of the local attorney and the long-term public relations interest of his company. The attorney is not relieved of possible embarrassment unless his actions are made known to, and understood by, the company he represents.

For instance, if local counsel finds an opportunity to settle a suit against his company client in a certain manner for a certain amount, knowing that to take advantage of such opportunity would greatly enhance his professional reputation with the company, yet knowing also that to make such settlement may subject the company to unfavorable publicity and harmful criticism, counsel should not either dismiss or accept the opportunity without making a thorough explanation to the company. To make the settlement and reap the personal benefit is often the easier way out, yet often it is not the best way for the company, which has a right to expect that counsel will properly evaluate his actions in terms of their public relations aspect.

The part played by local counsel embraces a certain function which the French call "liaison"—the connecting touch—the intercommunication of intelligence. Reporting to the company is an important part of counsel's public relations job. He should recognize both public likes and dislikes and inform the company of them. Those dislikes not disposed of by clear explanations of company practice and procedures should be the subject of special reports. Since counsel is the local eyes, ears and brains of the company, he is expected to exercise his function as liaison agent with regard to all the persons, firms and corporations that he contacts for the company.

The field attorney should cooperate to the best of his ability with physicians, surgeons and hospitals and should make known to them the desire of his company to cooperate—they should be told when they are first interviewed what the attorney will try to do to protect their interests, and the possible difficulties he may encounter. For example, they may be told that he will, if possible, see to it that reasonable bills will be paid out of the total amounts paid in settlement. Whenever the opportunity presents itself, local counsel should work through friendly personal acquaintance and in cooperation with police officers, sheriffs, automobile men, and with city, county and state officials whose duties have any relationship to the company's business.

Propagandists will attest that there is great weight and emphasis in repetition. Repeatedly, then, as the opportunity is presented, counsel should indicate his pride, profess his faith and express his confidence in his profession, and in his companies. He should talk about his companies to those whom he meets—tell them about his favorable experiences with company clients, and of the fairness of the company in its treatment of claimants and policyholders.

Besides frequently speaking well of our own companies, we should refrain from speaking ill of others. The public regards the casualty business as a house, and as Lincoln said, "a house divided against itself cannot stand." So let us not knock other companies and thus tear down our common business. The individual starts out with a good name—the company must acquire it. "Who steals my purse steals trash*** but he that filches from me my good name robs me of that which not enriches him and makes me poor indeed." That quotation from Shakespeare is applicable not only to the individual, but to the insurance company as well.

There are existing practises in our business and profession that I deem detrimental to good public relations: One is the tendency of the companies to choose litigation rather than the conference table as means of settling disputes among themselves concerning their respective policy obligations — which company should act in settlement negotiations, and how, among them, the settlement amounts should be divided.

There is no apparent reason why the officers and attorneys of casualty insurance companies cannot, among themselves, iron out almost all of the difficulties and troublesome problems that cause friction between companies and that now find their way into court. If the public sees that we cannot keep our own house in order, how can we hope to gain full public respect and confidence and the benefits which result therefrom?

We counsel, who have spent the greater part of our lives in the solution of insurance problems and in efforts to understand all phases of the business, should be more com-

petent than are most members of the bench or the most intelligent of juries, to dispose equitably, at the conference table, of nine-tenths of the cases between companies now found on the court dockets.

To avoid the "black eyes" which result from such unnecessary litigation between companies, those officers charged with their companies' public relations must first learn to prefer amicable disposition to a law suit. The disposition of the Company to avoid such litigation should be as purposeful as was Murphy's:

> "Murphy," said the judge, "why can't this case be settled out of court?"
>
> "Sure," said Murphy, "that's what we were a-tryin' to do Your Honor, when the police interfered."

Company officers must see to it that their associates whose responsibility it is to make decision as to compromise or litigation, must also be public relations minded. These associates must be taught to evaluate *all the benefits* and *all the detriments* accruing to the company as a result of deciding in favor of either course of action.

It is only right that the most influential factor in our determination of the procedure to be followed should be the monetary gain or loss which would accrue to our own company in the event a dispute with another company were carried into court. No matter how intensely we are imbued with the spirit of public relations, we cannot disregard that factor. But we can learn that public confidence either lost or gained, has a definite value which should not be dismissed from consideration merely because it is hard to translate into terms of "dollars and cents."

Prospective and direct monetary gains or losses should not, as an invariable policy, be permitted always to outweigh the more indirect yet sometimes the more substantial public relations benefits or detriments involved by our decision to enter into litigation. Looking at it only from this practical angle—the monetary angle—we and the companies which we represent should, by this time, have realized that we may act to better advantage, both to ourselves and our clients, if company policy we help to make dictates adherence to the rules of fair play, to the use of joint conferences for amicable adjustment and of arbitration, and of the exchange of experience and ideas to the end that all companies will act in concert for their greatest mutual advantage.

Another detrimental practice, sometimes followed without first consulting with local counsel for the other insurer as to its disposition in the matter, is that of encouraging and advising insureds, their passengers, and other claimants, to file suits for damages for bodily injury against the policyholder of another insurance company, the objective being to aid the enforcement of subrogation rights respecting collision loss payments or to aid in the attempt to shift the burden of liability losses. To make unfair suggestions which misdirect the recovery effort of an injured claimant in an effort to minimize a claim against one's own company, or for other reasons, is unethical and inimical to good public relations.

When two liability insurers have obligations with respect to bodily injury claims arising out of a certain accident, that local counsel for one of these companies makes himself a good public relations counsel for his own company and for our business, if he, while thinking first of the interests of his own company, forehandedly consults with counsel for the other company to help protect its interests against unfair claims or unnecessary litigation. The respective interests of the companies, actually, are often more in harmony than we are willing to recognize. Where there is harmony and mutuality, based on truth, there need be no question of loyalty to one's own company.

Though at this time it may be difficult for liability insurance companies to agree on a code of ethics governing their conduct in situations similar to those called to your attention, local counsel who agree with me that such situations are in need of remedy may do much to mold the policies of their client companies and in paving the way, by action and suggestion, toward creating, in the future, an agreed standard of conduct and practice between liability insurance companies. Very much larger areas of agreement on fact, in principal, and of mutuality of interest can be reached. We need only to make a real effort. We must not be cynical about the prospect for cooperation among the companies, nor should we condemn the hope as unrealistic.

The only dike strong enough to hold off the future onslaught of unfavorable and ill considered legislation concerning our business, is public opinion—a favorable opinion

consciously built by adherence to a preordained and definite policy which includes acceptance by every company of the responsibility of keeping its own house in order. Much of the misunderstanding concerning our business —misunderstanding giving the appearance of a house not in order—can be eliminated. It will disappear with the elimination of our own apathy—the willingness of insurance people generally to accept passively unjust criticism and misstatements. Local counsel must be so well informed about the insurance business and the phases of it with which they deal, and so impeccable in their intentions and conduct, that they may defend their companies and themselves. They *should* speak out in defense when there is unwarranted criticism—doing so in a courteous, dignified and explanatory manner.

Some ill will naturally flows from the failure of others to understand the reasons for what is done by the local counsel; and often this failure is chargeable to a sin of omission on the part of the counsel; he has failed to justify the "No" he has given to a policyholder or he has failed properly to explain to a claimant why he has taken a certain position with reference to that person's suit. By expressing his intentions and by explaining his actions currently as he goes along, local counsel, and the persons with whom he deals, will gain that understanding which makes for harmony . . . and this harmony is the heart of the company's public relations.

The local counsel must work in harmony with the company's agents whose role is also very important in public relations and primary in production. Counsel can help to build and maintain public favor by keeping close liaison with these men who produce the business. Counsel may often use the agent to make contact with the insured and thus open the first interview between the attorney and the policyholder in an atmosphere of friendly service. It is natural for the insured to look to the person who sold him the policy. So that the agent's public relations function will be aided, counsel will do well to keep him informed of important developments in cases in which he has expressed interest.

I do not wish to leave you with the impression that the only thing to do to qualify in public relations—is to radiate sweetness and light—and pay and smile. I merely ask the local counsel to recognize and take advantage of those instances in which a particular manner of action on his part will add to his company's good will. I ask him to change his present practices only in those respects in which they are incompatible with the long-term good will of his client, the insurance company. The specific practice, if any, in need of change in the case of each individual local counsel, he and he alone, knows. But as the companies pay more and more attention to their public relations and to the elimination of faults which destroy these relations, the faults of particular local counsel will come to light. He is important as the most advanced outpost of the company; if he fails in his public relations function, his company will not progress.

When the public buys insurance they buy an intangible product, and after loss, they want to see what we have, to see us in action —in the process and delivery of the product they bought. The agents have sold them impressions of courtesy, of sympathetic consideration, of friendly instruction and assistance, and of payment of obligations readily and in full measure. Local counsel cannot "let them down" on these impressions and have any good will left.

It is not enough for local counsel to investigate fully, negotiate skillfully, and defend successfully. It is only enough if, in addition, local counsel is forebearing, if he explains, if he is sympathetic, and if he leaves friendship and good will in the wake of his work by impressing the claimant, the policyholder and the public with the fairness of his own practices and those of his company. That local counsel who demonstrates the skill and poise of the technician in law, anatomy, psychology, salesmanship, and in factfinding in scores of fields, and yet who is gracious and grateful—there is a craftsman and a scholar, an ambassador of good will and a builder of better business.

Members in Attendance at Convention

Adams, St. Clair, Jr., New Orleans, La.
Aiken, Arthur L., Fort Wayne, Ind.
Albert, Milton A., Baltimore, Md.
Alexander, E. Dean, Detroit, Mich.
Anderson, James Alonzo, Shelby, Ohio.
Anderson, John H., Jr., Raleigh, N. C.
Andrews, John D., Hamilton, Ohio.
Baier, Milton L., Buffalo, N. Y.
Baker, Harold G., E. St. Louis, Ill.
Baker, Sam Rice, Montgomery, Ala.
Ball, Fred S., Jr., Montgomery, Ala.
Bannister, Wayne, Denver, Colo.
Barber, A. L., Little Rock, Ark.
Bartlett, Thomas, Baltimore, Md.
Barton, John L., Omaha, Nebr.
Bass, Leslie, Knoxville, Tenn.
Baylor, F. B., Lincoln, Nebr.
Beard, Leslie P., New Orleans, La.
Beckwith, Oliver R., Hartford, Conn.
Beechwood, George Eugene, Philadelphia, Pa.
BeGole, Ari M., Detroit, Mich.
Bennett, William Jay Jr., Columbia, Ohio.
Benoy, Wilbur E., Columbus, Ohio.
Betts, Forrest A., Los Angeles, Calif.
Biggs, J. Crawford, Raleigh, N. C.
Blair, James T., Jr., Jefferson City, Mo.
Blakey, James C., Birmingham, Ala.
Bond, George H., Syracuse, New York.
Bridgers, J. H., Henderson, N. C.
Bronson, E. D., Jr., San Francisco, Calif.
Brosmith, Allan E., Hartford, Conn.
Brown, Garfield W., Chicago, Ill.
Brown, Mart, Oklahoma City, Okla.
Brown, Oscar J., Syracuse, N. Y.
Buist, George L., Charleston, S. C.
Burke, Patrick F., Philadelphia, Pa.
Burnett, C. A., Pittsburg, Kan.
Burns, George, Rochester, N. Y.
Bussey, James S., Augusta, Georgia.
Butler, James A., Cleveland, Ohio.
Cain, Pinckney L., Columbia, S. C.
Carey, L. J., Detroit, Mich.
Caverly, Raymond N., New York City.
Christian, Andrew D., Richmond, Va.
Christovich, Alvin R., New Orleans, La.
Clarke, William F., Baltimore, Md.
Cobourn, Frank M., Toledo, Ohio.
Coen, Thomas M., Chicago, Ill.
Cole, Charles J., Toledo, Ohio.
Coleman, Fletcher B., Bloomington, Ill.
Combs, Hugh D., Baltimore, Md.
Cooper, Thomas D., Burlington, N. C.
Cope, Kenneth B., Canton, Ohio.
Corbitt, James H., Suffolk, Virginia.
Cull, Frank X., Cleveland, Ohio.
Curran, Ray W., Kansas City, Mo.
Dalzell, R. D., Pittsburgh, Pa.
Daniel, Todd, Philadelphia, Pa.
Davis, Leonard H., Norfolk, Va.
DeLacy, G. L., Omaha, Nebraska.
Denmead, Garner W., Baltimore, Md.
Detweiler, George H., Philadelphia, Pa.
Dickie, J. Roy, Pittsburgh, Pa.
Diehm, Ellis Raymond, Cleveland, Ohio.
Dodd, Lester P., Detroit, Mich.
Drake, Hervey J., New York City.
Duckett, O. Bowie, Jr., Baltimore, Md.
Duke, W. E., Charlottesville, Va.
Dunn, Evans, Birmingham, Ala.
Eaton, William R., Denver, Colo.
Ely, Wayne, St. Louis, Mo.
Farabaugh, Gallitzen A., South Bend, Ind.
Fellers, James D., Oklahoma City, Okla.
Fisher, Cletus A., New Philadelphia, Ohio.
Ferguson, Chester H., Tampa, Fla.
Field, Elias, Boston, Mass.
Field, Richard H., Boston, Mass.
Fields, Ernest W., New York City.
Finn, William A., Toledo, Ohio.
Fleming, Edward E., Miami, Fla.
Foley, Gerald T., Newark, N. J.
Folts, Aubrey, Chattanooga, Tenn.
Foster, John E., Columbus, Ohio.
Fowler, Rex H., Des Moines, Iowa.
Ford, Byron Edward, Columbus, Ohio.
Francis, John J., Newark, N. J.
Francis, Marshall H., Steubenville, Ohio.
Freeman, William H., Minneapolis, Minn.
Gallagher, Donald, Albany, New York.
Gallagher, Lasher B., Los Angeles, Calif.
Goddin, John C., Richmond, Va.
Gorton, Victor C., Chicago, Ill.
Gover, Charles, Charlotte, N. C.
Green, Alfred A., Daytona Beach., Fla.
Green, Charles W., Rochester, N. Y.
Greene, Harry L., Atlanta, Ga.
Grelle, Robert C., Madison, Wisconsin.
Gresham, Newton, Houston, Texas.
Groce, Josh H., San Antonio, Texas.
Grooms, Hobart, Birmingham, Ala.
Grubb, Kenneth P., Milwaukee, Wis.
Haberman, Phillip, Jr., New York City.
Hall, Albert B., Dallas, Texas.
Hamrick, Fred D., Rutherfordton, N. C.
Hargrave, Herbert W. J., New York City.
Harrison, Walter V., Baltimore, Md.
Havighurst, James W., Cleveland, Ohio.
Hawkins, Kenneth B., Chicago, Ill.
Hawxhurst, Ralph R., Chicago, Ill.
Hayes, Gerald P., Milwaukee, Wis.
Heffernan, Henry J., Augusta, Ga.
Hemry, Leslie P., Boston, Mass.
Heneghan, George E., St. Louis, Mo.
Henry, E. A., Little Rock, Ark.
Hensel, Eugene L., Columbus, Ohio.
Heyl, Clarence W., Peoria, Ill.
Hobson, Robert P., Louisville, Ky.
Hocker, Lon, Jr., St. Louis, Mo.
Holt, Francis M., Jacksonville, Fla.
Horn, Clinton M., Cleveland, Ohio.
Horner, J. M., Jr., Asheville, N. C.
Hughes, James W., Los Angeles, Calif.
Hughes, John H., Syracuse, N. Y.
Jackson, Thomas B., Charleston, W. Va.
Johnson, F. Carter, Jr., New Orleans, La.
Kammer, Alfred C., New Orleans, La.
Karr, Payne, Seattle, Wash.
Keller, A. Bruce, Pittsburg, Kan.
Kelly, William A., Akron, Ohio.
Kennedy, Frank H., Charlotte, N. C.
King, Bert, Wichita Falls, Texas.
King, Oliver K., White Plains, N. Y.
Kluwin, John A., Milwaukee, Wis.

Knepper, William E., Columbus, Ohio.
Knight, Harry S., Sunbury, Pa.
Knowles, William F., Kansas City, Mo.
Kottgen, Hector, New York City.
Kristeller, Lionel, Newark, N. J.
LaBrum, J. Harry, Philadelphia, Pa.
Levi, Clyde R., Ashland, Kentucky.
Levin, Samuel, Chicago, Ill.
LeViness, Charles T. III, Baltimore, Md.
Lloyd, Frank T., Jr., Camden, N. J.
Lloyd, L. Duncan, Chicago, Ill.
Maguire, Raymer F., Orlando, Fla.
Manier, Miller, Nashville, Tenn.
Marriner, Rufus S., Washington, Pa.
Marryott, Franklin J., Boston, Mass.
Martin, John B., Philadelphia, Pa.
Mason, Stevens T., Detroit, Mich.
May, John G., Jr., Richmond, Va.
May, Philip S., Jacksonville, Fla.
Merrell, C. F., Indianapolis, Ind.
Montgomery, Richard B., Jr., New Orleans, La.
Moore, Benjamin A., Charleston, S. C.
Morehead, Charles A., Miami, Fla.
Morris, Stanley C., Charleston, W. Va.
Morse, Rupert G., Kansas City, Mo.
Moser, Henry S., Chicago, Ill.
Moser, W. Edwin, St. Louis, Mo.
Mudd, J. P., Birmingham, Ala.
Mungall, Daniel, Philadelphia, Pa.
Murphy, Joseph B., Syracuse, N. Y.
McAlister, David I., Washington, Pa.
McDonald, W. Percy, Memphis, Tenn.
McGinn, Denis, Escanaba, Mich.
McGough, Paul J., Minneapolis, Minn.
McGugin, Dan E., Jr., Nashville, Tenn.
McKay, John G., Miami, Fla.
McNeal, Harley J., Cleveland, Ohio.
Naught, George L., New York City.
Nelson, P. H., Columbia, S. C.
Nelson, Robert M., Memphis, Tenn.
Nichols, Henry W., New York City.
Niehaus, John M., Jr., Peoria, Ill.
Noll, Robert M., Marietta, Ohio.
Noone, Charles A., Chattanooga, Tenn.
Nugent, James E., Kansas City, Mo.
O'Farrell, William T., Charleston, W. Va.
O'Hara, James M., Utica, N. Y.
Orlando, Samuel P., Camden, N. J.
Orr, Charles N., St. Paul, Minn.
Osborne, H. P., Jacksonville, Fla.
O'Sullivan, J. Francis, Kansas City, Mo.
Owens, Grover T., Little Rock, Ark.
Parker, Leo B., Kansas City, Mo.
Pickrel, William G., Dayton, Ohio.
Poore, H. T., Knoxville, Tenn.
Popper, Joseph W., Macon, Ga.
Porteous, William A., Jr., New Orleans, La.
Powell, Arthur G., Atlanta, Ga.
Pringle, Samuel W., Pittsburgh, Pa.
Proctor, Charles W., Worcester, Mass.
Racine, Charles W., Toledo, Ohio.
Reed, William L., Miami, Fla.
Reeder, P. E., Kansas City, Mo.
Reeder, William O., St. Louis, Mo.
Roberts, E. A., St. Paul, Minn.
Roberts, H. Melvin, Cleveland, Ohio.
Roberts, Melvin M., Cleveland, Ohio.
Rogoski, Alexis J., Muskegon, Mich.
Romanach, Dr. Guillermo Diaz, Havana, Cuba.
Rowe, Royce G., Chicago, Ill.
Ryan, Lewis C., Syracuse, N. Y.
Saxby, Russell G., Columbus, Ohio.
Schisler, J. Harry, Baltimore, Md.
Schlipf, Albert C., Springfield, Ill.
Schneider, Philip J., Cincinnati, Ohio.
Schwartz, Wilbur C., St. Louis, Mo.
Searl, William C., Lansing, Mich.
Seiler, Robert E., Joplin, Mo.
Shackleford, R. W., Tampa, Fla.
Shaylor, Clyde L., Ashtabula, Ohio.
Shipman, F. L., Troy, Ohio.
Sinnott, S. L., Richmond, Virginia.
Skeen, J. H., Baltimore, Md.
Slaton, John M., Atlanta, Ga.
Smallwood, Robert L., Jr., Oxford, Miss.
Smith, Willis, Raleigh, N. C.
Snow, C. B., Jackson, Miss.
Spray, Joseph A., Los Angeles, Calif.
Sprinkle, Paul C., Kansas City, Mo.
Stathers, William G., Clarksburg, W. Va.
Stewart, Don W., Lincoln, Nebr.
Stewart, Joseph R., Kansas City, Mo.
Stitchter, Wayne E., Toledo, Ohio.
Strasburger, Henry W., Dallas, Texas.
Strite, Edwin D., Chambersburg, Pa.
Sweet, Joe G., San Francisco, Calif.
Sweitzer, J. Mearl, Wausau, Wis.
Tangeman, Carl, Columbus, Ohio.
Ten Eyck, Barent, New York City.
Thompson, Will C., Dallas, Texas.
Thurman, Hal C., Oklahoma City, Okla.
Thurman, Harold C., Oklahoma City, Okla.
Todd, W. B., Fort Worth, Texas.
Topping, Price H., New York City.
Townsend, Mark, Jr., Jersey City, N. J.
Van Duzer, Ashley M., Cleveland, Ohio.
Vogel, Leslie H., Chicago, Ill.
Warren, F. G., Sioux Falls, S. D.
Weichelt, George M., Chicago, Ill.
Weiss, Sol, New Orleans, La.
Werner, Victor Davis, New York City.
White, Andrew J., Jr., Columbus, Ohio.
White, Lowell, Denver, Colo.
White, Morris E., Tampa, Fla.
Whitfield, Allen, Des Moines, Iowa.
Wiley, John F., Washington, Pa.
Williams, Silas, Chattanooga, Tenn.
Winans, William M., Brooklyn, N. Y.
Wise, Chester G., Akron, Ohio.
Woodward, Fielden, Louisville, Ky.
Wright, Isaac C., Wilmington, N. C.
Yancey, George W., Birmingham, Ala.
Young, Robert F., Dayton, Ohio.
Zelt, Wray G., Jr., Washington, Pa.
Zurett, Melvin H., Rochester, N. Y.

Guests in Attendance at Convention

Andrews, Earle E., Boston, Mass.
Barnard, Herbert E., St. Louis, Mo.
Baylor, James, Lincoln Nebr.
Baylor, John R., Lincoln, Nebr.
Bennethum, William H., Wilmington, Del.
Browne, E. Wayles, Shreveport, La.
Catri, Peter, Sandusky, Ohio.
Cattermole, A. G., Los Angeles, Calif.
Christovich, Alvin, Jr., New Orleans, La.
Cobbs, R. M., Akron, Ohio.
Cole, Robert L., Jr., Houston, Texas.
Cooper, Harry P., Jr., Indianapolis, Ind.
Cox, Taylor H., Knoxville, Tenn.
Cox, Virgil, Greensboro, N. C.
Davis, Fred L., Parkersburg, W. Va.
Doyle, Thomas F., Jersey City, N. J.
Dineen, Robert E., Syracuse, N. Y.
Dimond, Herbert F., New York City.
Faude, John P., Hartford, Conn.
Gooch, J. A., Fort Worth, Texas.
Graves, James A., Orlando, Fla.
Heafey, Edwin A., Oakland, Calif.
Herb, J. Willis, Kenilworth, Ill.
Hobbs, J. W., Jefferson City, Mo.
Holt, Robert R., Jacksonville, Fla.
Keller, George J., Buffalo, N. Y.
Kitch, John R., Chicago, Ill.
Kline, Joseph, Frederick, Md.
Knight, Fred S., New York City.
Kramer, Donald W., Binghamton, N. Y.
Lancaster, J. L., Jr., Dallas, Texas.
Lawrence, T. L., Baltimore, Md.
Liddon, Walker, Ft. Pierce, Fla.
Meadows, Clarence, Charleston, W. Va.
Moore, Lawrence B., Indianapolis, Ind.
McKesson, Theodore G., Phoenix, Arizona.
Neely, Edgar A., Atlanta, Ga.
Prizer, John E., Philadelphia, Pa.
Reeder, Shackelford, St. Louis, Mo.
Rennels, Lamont N., Dayton, Ohio.
Reynolds, Hugh E., Indianapolis, Ind.
Riordan, Paul H., Worcester, Mass.
Roemer, Erwin W., Chicago, Ill.
Scott, John W., Joplin, Mo.
Searl, William C., Jr., Lansing, Mich.
Smith, J. Maxwell, Philadelphia, Pa.
Smith, Lewis P., Jr., Syracuse, N. Y.
Strite, Edwin D., Chambersburg, Pa.
Strubinger, Bert E., St. Louis, Mo.
Stryker, Hird, Omaha, Nebr.
Thomsen, Roszel C., Baltimore, Md.
Townsend, Mark III, Jersey City, N. J.
Walker, John L., Roanoke, Va.
White, Edger, Denver, Colo.
Wise, W. B., New York City.

Ladies in Attendance at Convention

Aiken, Mrs. A. L., Fort Wayne, Ind.
Alexander, Mrs. E. Dean, Detroit, Mich.
Anderson, Mrs. J. A., Shelby, Ohio.
Anderson, Mrs. John H., Jr., Raleigh, N. C.
Baier, Mrs. Milton L., Buffalo, N. Y.
Baker, Mrs. Harold G., E. St. Louis, Ill.
Baker, Mrs. Sam Rice, Montgomery, Ala.
Baker, Mrs. W. R., New York City.
Ball, Mrs. Fred S., Jr., Montgomery, Ala.
Beard, Betty (Miss), New Orleans, La.
BeGole, Mrs. Ari M., Detroit, Mich.
Bennethum, Mrs. William H., Wilmington, Del.
Bennett, Mrs. W. Jay Jr., Columbus, Ohio.
Brown, Billie (Miss), Syracuse, N. Y.
Brown, Mrs. Oscar J., Syracuse, N. Y.
Burns, Mrs. George, Rochester, N. Y.
Bussey, Mrs. James S., Augusta, Ga.
Butler, Mrs. James A., Cleveland, Ohio.
Carey, Mrs. L. J., Detroit, Mich.
Caverly, Mrs. R. N., New York City.
Cobbs, Mrs. Rex, Akron, Ohio.
Cobourn, Mrs. Frank M., Toledo, Ohio.
Cole, Mrs. Charles J., Toledo, Ohio.
Cole, Mrs. Robert L., Jr., Houston, Texas.
Coleman, Mrs. Fletcher, Bloomington, Ill.
Cooper, Mrs. Thomas D., Burlington, N. C.
Cope, Mrs. K. B., Canton, Ohio.
Cull, Mrs. Frank X., Cleveland Heights, Ohio.
Dalzell, Mrs. R. D., Pittsburgh, Pa.
Dalzell, Kathleen (Miss), Pittsburgh, Pa.
Daniel, Mrs. Todd, Philadelphia, Pa.
Davis, Mrs. Leonard H., Norfolk, Va.
Denmead, Mrs. Garner, Baltimore, Md.
Detweiler, Mrs. George H., Philadelphia, Pa.
Dickie, Mrs. J. Roy, Pittsburgh, Pa.
Dineen, Mrs. R. E., Syracuse, N. Y.
Dimond, Mrs. H. F., New York City.
Dodd, Mrs. L. P., Detroit, Mich.
Duckett, Mrs. O. Bowie Jr., Baltimore, Md.
Dunn, Mrs. Evans, Birmingham, Ala.
Eaton, Mrs. William R., Denver, Colo.
Ely, Mrs. Wayne, St. Louis, Mo.
Farabaugh, Mrs. G. A., South Bend, Ind.
Ferguson, Mrs. Chester, Tampa, Fla.
Fisher, Mrs. Cletus A., New Philadelphia, Ohio.
Field, Mrs. Elias, Boston, Mass.
Fleming, Mrs. Edward E., Miami, Florida.
Ford, Mrs. Byron E., Columbus, Ohio.
Francis, Mrs. M. H., Steubenville, O.
Freeman, Mrs. William H., Minneapolis, Minn.
Frost, Mrs. C. C., Richmond, Va.
Gallagher, Mrs. Donald, Albany, N. Y.
Gooch, Mrs. J. A., Fort Worth, Texas.
Gover, Mrs. C. H., Charlotte, N. C.
Graves, Mrs. James A., Orlando, Fla.
Green, Mrs. Charles W., Rochester, N. Y.
Greene, Mrs. Harry L., Atlanta, Ga.
Grelle, Mrs. R. C., Madison, Wis
Gresham, Mrs Newton, Houston, Texas.
Grooms, Mrs. Hobart, Birmingham, Ala.
Grubb, Mrs. Kenneth P., Milwaukee, Wis.
Hamrick, Mrs. Fred D., Rutherfordton. N. C.
Havighurst, Mrs. James W., Cleveland,
Hayes, Mrs. Gerald P., Milwaukee, Wis.
Herb, Mrs. J. Willis, Kenilworth, Ill.
Hobbs, Mrs. J. W., Jefferson City Mo.
Holt, Fannie (Miss), Jacksonville, Fla.
Holt, Mrs. Frank, Jacksonville, Fla.
Horner, Mrs. J. M., Jr., Asheville, N. C.
Hughes, Mrs. John H., Syracuse, N. Y.
Knepper, Mrs. W. E., Columbus, Ohio.
Keller, Mrs. George J., Buffalo, N. Y.
Kelly, Mrs. Wm. A., Akron, Ohio.
Kennedy, Mrs. Frank H., Charlotte, N. C.
Kitch, Mrs. John R., Chicago, Ill.
Knight, Mrs. Fred S., Forest Hills, N. Y.
Knight, Mrs. Harry S., Sunbury, Pa.
Kottgen, Mrs. Hector, New York City.
Kramer, Mrs. Donald W., Binghamton, N. Y.
Kristeller, Lois, Newark, N. J.
Kristeller, Mrs. Lionel P., Newark, N. J.
Levi, Mrs. Clyde R., Ashland, Ky.
LeViness, Mrs. Hildegarde, Baltimore, Md.
Lloyd, Mrs. Duncan, Chicago, Ill.
Marriner, Mrs. Rufus S., Washington, Pa.
Martin, Mrs. John B., Philadelphia, Pa.
McAlister, Mrs. David I., Washington, Pa.
McNeal, Mrs. Harley J., Cleveland, Ohio.
Montgomery, Mrs. R. B., Jr., New Orleans, La.
Morehead, Mrs. Charles A., Miami, Fla.
Neeley, Mrs. Edgar A., Atlanta, Ga.
Nelson, Mrs. Robert M., Memphis, Tenn.
Nugent, Mrs. J. E., Kansas City, Mo.
Pickrel, Mrs. William G., Dayton, Ohio.
Poore, Mrs. H. T., Knoxville, Tenn.
Popper, Mrs. Joseph, Macon, Ga.
Porteous, Mrs. William A. Jr., New Orleans, La.
Pringle, Mrs. Samuel W., Pittsburgh, Pa.
Reeder, Mrs. William O., St. Louis, Mo.
Roberts, Mrs. H. M., Cleveland, Ohio.
Roemer, Mrs. Rose L., River Forest, Ill.
Ryan, Mrs. Lewis C., Syracuse, N. Y.
Saxby, Mrs. R. G., Columbus, Ohio.
Schneider, Mrs. P. J., Cincinnati, Ohio.
Searl, Mrs. William C., Lansing, Mich.
Sweitzer, Mrs. J. Mearle, Wausau, Wis.
Shaylor, Mrs. C. L., Ashtabula, Ohio.
Slaton, Mrs. John M., Atlanta, Ga.
Smith, Mrs. J. Maxwell, Philadelphia, Pa.
Smith, Mrs. Lewis P., Jr., Syracuse, N. Y.
Smythe, Frances R. (Miss), Charleston, S. C.
Stewart, Mrs. J. R., Kansas City, Mo.
Stichter, Mrs. Wayne, Toledo, Ohio.
Thompson, Florence, Dallas, Texas.
Thompson, Mrs. W. C., Dallas, Texas.
Todd, Mrs. W. B., Fort Worth, Tex.
Topping, Mrs. Price H., New York City.
Townsend, Natalie, Jersey City, N. J.
Werner, Mrs. Victor D., New York City.
White, Mrs. Andrew J., Jr., Columbus, Ohio.
White, Mrs. Lowell, Denver, Colo.
White, Patricia (Miss), Denver, Colo.
Wiley, Mrs. John F., Washington, Pa.
Wright, Mrs. Isaac, Wilmington, N. C.
Young, Mrs. Robert F., Dayton, Ohio.
Zelt, Mrs. Wray G., Jr., Washington, Pa.
Zurett, Mrs. Melvin H., Rochester, N. Y.

End